88-1194

No.

Supreme Court, U.S.
FILED
JAN 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

ICELEAN CLARK, *et al.*,
Petitioners,

vs.

KALIMA JENKINS, *et al.*,
Respondents,

vs.

THE STATE OF MISSOURI, *et al.*,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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January 11, 1989

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QUESTIONS PRESENTED

On September 15, 1987, the District Court below ordered an unprecedented $1.95 increase in the school property tax levy paid by Petitioners to fund court-ordered desegregation remedies. Prior to this, no school district taxpayer had been made a party to this suit; only the State of Missouri and the local school district had been found jointly and severally liable for constitutional violations and only these defendants had been held financially responsible for funding desegregation remedies.

On September 25, 1987, Petitioners moved for leave to intervene in the District Court's proceedings to challenge the constitutional authority of a federal judge to "lay and collect Taxes." The District Court denied Petitioners' request for intervention as "not timely." The Court of Appeals affirmed the denial of intervention on timeliness grounds and, further, affirmed, as modified, the court-ordered property taxation scheme.

The questions presented are these:

1. Did the lower courts erroneously deny Petitioners' request for intervention of right under Rule 24 (a) (2), Fed.R.Civ.P., on grounds of untimeliness contrary to applicable decisions of this Court?

2. Did the lower courts' intervention decisions infringe Petitioners' due process right to protect themselves from an unconstitutional seizure of their property by a federal judge's unprecedented decision to "lay and collect Taxes"?

LIST OF PARTIES AND RULE 28.1 LIST

Petitioners are Icelean Clark, Bobby Anderton, Eleanor Graham, John C. Howard, Craig Martin, Gay D. Williams, Kansas City Mantel & Tile Co., and Coulas & Griffin Insurance Agency, Inc. These Petitioners are individual and corporate taxpayers who own property within the Kansas City, Missouri School District. Kansas City Mantel & Tile Co. and Coulas & Griffin Insurance Agency, Inc. are Missouri corporations with no parent companies, subsidiaries or affiliates as contemplated by Rule 28.1.

Respondents representing the plaintiff class of schoolchildren below are Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, Barbara Pugh; and Cynthia Winters, by her next friend, David Winters.

The American Federation of Teachers, Local 691 is an intervenor in the District Court proceedings and was a nominal appellee in Petitioners' appeal below (No. 87-2565WM) in the United States Court of Appeals for the Eighth Circuit.

Respondents representing the State defendants in addition to the State itself are the Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; the Missouri State

Board of Education, Roseann Bentley, Dan Blackwell, Terry A. Bond, Delmar A. Cobble, Grover Gamm, Jimmy Robertson, Robert L. Welling, and Donald E. West, Members; and Arthur L. Mallory, Commissioner of Education of the State of Missouri.

A named party below in addition to Respondent School District of Kansas City, Missouri is Claude C. Perkins, Superintendent.*

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*The listings of State Respondents and School District Respondents are as they appeared in the Court of Appeals. The present Superintendent of the School District of Kansas City, Missouri is George Garcia. The present Commissioner of Education for the State of Missouri is Robert E. Bartman. According to the official state manual, the current members of the Missouri State Board of Education are Bentley, Blackwell, Bond, Thomas R. Davis, Susan D. Finke, Raymond F. McCallister, Jr., Cynthia B. Thompson and Roger L. Tolliver.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Icelean Clark, Bobby Anderton, Eleanor Graham, John C. Howard, Craig Martin, Gay D. Williams, Kansas City Mantel & Tile Co., and Coulas & Griffin Insurance Agency, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-captioned matter on August 19, 1988.

OPINIONS BELOW

The amended order of the United States Court of Appeals for the Eighth Circuit denying rehearing and rehearing *en banc* (Appendix at A53) is unpublished. The prior panel opinion of the Court of Appeals (App., A1-A52) is reported at 855 F.2d 1295. The September 15, 1987 opinion of the United States District Court for the Western District of Missouri imposing taxes (App., A55-A82) is reported at 672 F.Supp. 400. The October 27, 1987 order of the District Court denying Petitioners' motion for leave to intervene (App., A83-A85) is unpublished.

JURISDICTION

The judgment of the Court of Appeals (App., A86) was entered on August 19, 1988. Petitions for rehearing and rehearing *en banc* were denied on October 14, 1988. This order denying rehearing was amended on October 24, 1988 to include dissents. (App., A53.)

The jurisdiction of this Court to review the judgment and opinion of the Eighth Circuit is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

U.S. Const. amend. V provides in pertinent part:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 24(a)(2), Fed.R.Civ.P., provides:

> **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

This petition embraces fundamental constitutional issues of judicial taxation and due process which have recently arisen out of the Kansas City, Missouri School District ("KCMSD") desegregation litigation. The plaintiff class of schoolchildren filed their complaint in the United States District Court for the Western District of Missouri in 1977 alleging violations of the Equal Protection Clause of the Fourteenth Amendment and seeking desegregation relief. The District Court entered a judgment on September 17, 1984 in favor of the plaintiffs and held the KCMSD and the State of Missouri jointly and severally liable for the equal protection violations in the segregated operation of the Kansas City schools. This judgment rejected an interdistrict remedy involving suburban school districts and imposed an intradistrict remedy against only these two defendants; this judgment was affirmed, as modified, by the United States Court of Appeals for the Eighth Circuit. *See Jenkins v. State of Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984), *aff'd in part & rev'd in part*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 70 (1987).

Since June 14, 1985, the District Court has entered a series of remedial orders approving the expenditure of millions of dollars for capital improvements of the KCMSD and for the funding of the operating and desegregation budgets of the KCMSD. In all instances, the financial liability for such remedies fell only on the KCMSD and the State of Missouri, jointly and severally.

On September 15, 1987, the District Court entered an order approving extensive KCMSD capital improvement projects and a far-reaching magnet schools plan. The jurisdiction of the District Court was invoked under 28 U.S.C. Section 1331. The KCMSD and the State of Missouri again were held to be jointly and severally liable for financing these new programs as well as continued desegregation costs. The court found the KCMSD to be without revenues sufficient to fund its share of the capital improvement costs and additional desegregation expenditures. However, rather than require the State to fund or advance any of the school district's added financial obligations, the District Court granted in part the KCMSD's motion for funding relief and ordered:

> [T]hat in order to fund the obligation of the KCMSD for the desegregation program, a surtax of 1.5% is added to the Missouri State Income Tax for all persons and entities receiving income for work done, services rendered, and income received from activities within the KCMSD and the tax levy for the KCMSD is raised [from $2.05] to $4.00 per $100 assessed valuation.

Jenkins v. State of Missouri, 672 F. Supp. 400, 413 (W.D. Mo. 1987), *aff'd in part & rev'd in part*, 855 F.2d 1295 (8th Cir. 1988). (App., A82.)

In arriving at this startling decision, the District Court believed that it was "left with no choice but to exercise its broad equitable powers . . . [to] insure that the constitutional violations committed by the KCMSD and the State of Missouri are cured." (App., A78.) The court went on to conclude that it had "no alternative but to impose tax measures which will enable KCMSD to meet its share of the cost of the desegregation plan." (*Id.*, A79-A80.)

Thereafter, both court-ordered taxes were collected from Petitioners and other similarly-situated Kansas City taxpayers.

On September 25, 1987, Petitioners filed with the District Court their motion for leave to intervene of right in the proceedings in order to challenge the trial court's authority and jurisdiction to levy income and property taxes under the United States Constitution. They would be the only litigants in the suit actually paying these new taxes. The District Court denied[1] Petitioners' motion on October 27, 1987, concluding it was "not timely." (App., A84.)

The Court of Appeals affirmed the denial of intervention as "untimely." (App., A48.) The jurisdiction[2] of the Court of Appeals was invoked under 28 U.S.C. Section 1291. The Court of Appeals, relying on previous Eighth Circuit precedent, also affirmed the District Court's $1.95 property tax levy increase, but modified the future

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1. In this order, the District Court did permit Petitioners to participate as *amici curiae*. (App., A83.)

2. Petitioners also timely filed a protective notice of appeal (in No. 87-2693WM) covering the constitutional challenges to the September 15, 1987 taxation decision.

implementation of a court-approved property taxation scheme. (*Id.*, A30-A42.) Chief Judge Lay dissented from the affirmance of the court-ordered property tax. Noting that desegregation liability "was based upon a finding of joint and several tortfeasors" (*id.*, A50), Judge Lay suggested that court-ordered property taxation was inappropriate when the State could be held liable for the KCMSD's desegregation obligations.

The Court of Appeals did, however, reverse the judicially-imposed income tax surcharge, holding that the trial court "invaded the province of the legislature in ordering this surcharge, and that the order [was] beyond the power of the district court as outlined in" specified Supreme Court and Eighth Circuit precedent. (*Id.*, A44.) In reversing the surcharge, the Court of Appeals stated that "[a]ny unexpended collections must be refunded and the district court is directed to take such action as it deems appropriate with respect to any further refunds." (*Id.*, A45.)

On remand, the District Court granted intervention of right to certain Petitioners subject to the surcharge and entertained their motion for a full refund of all surcharge payments made. On January 3, 1989, the District Court granted these Petitioners' motion (on behalf of themselves and all similarly-situated surcharge taxpayers) and ordered the refund of more than $31 million.

REASONS FOR GRANTING THE WRIT

At the core of this petition is the basic question of the power of the federal judiciary in crafting constitutional remedies: Does this power encompass the authority to levy new taxes to generate revenue to fund a constitutional remedy? In this instance, the remedy involves desegregating public schools. However, the precedent established by the lower courts—and their creation of an Article III judicial taxation power—will, if left unchecked, serve as a springboard for future exercises of judicial taxation to remedy other constitutional violations.

This Court has never directly confronted such a question. Certainly, this Court has never sanctioned an Article III taxation power in the federal judiciary. The lower courts' action is a significant departure from the accepted and usual course of judicial proceedings. This newly-developed power presents an extremely important question of constitutional construction.

Petitioners are individual and corporate taxpayers who are paying the court-ordered taxes at issue. They were not parties to the underlying desegregation litigation; they had never been found liable for the constitutional wrongs committed or for the remedies to be implemented. Petitioners had no justiciable interest in these proceedings prior to the trial court's September 15, 1987 taxation decision. Nevertheless, Petitioners have never been permitted to participate as parties in this litigation to assert their constitutional challenges to the taking of their property—a taking accomplished through a court-ordered tax which inures to the financial benefit of all existing litigants, especially the two joint and several tortfeasors, the State of Missouri and the KCMSD.

As a result of the denial of Petitioners' intervention, the issue of judicial taxation cannot be squarely addressed until threshold due process considerations are resolved. First, this Court should recognize the dangerous precedent posed by the lower courts' erroneous intervention decisions. In holding Petitioners' September 25, 1987 request "untimely," and by requiring Petitioners and other Kansas City taxpayers to speculate on the judicial taxation "intentions" of a federal judge, the lower court decisions directly conflict with decisions of this Court and contravene fundamental principles of intervention. Second, the Court should recognize that these illogical rulings have infringed Petitioners' access to due process in the protection of their property from unlawful seizure. Finally, the Court should order arguments on the most important question in this litigation: Do federal courts have the power to "lay and collect Taxes" under Article III of the United States Constitution?

I.

THE LOWER COURTS' DENIAL OF PETITIONERS' INTERVENTION OF RIGHT ON GROUNDS OF UNTIMELINESS IS AN ERRONEOUS AND DANGEROUS PRECEDENT ON AN IMPORTANT QUESTION OF FEDERAL LAW WHICH IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. Petitioners' Motion To Intervene Was "Timely" Under Applicable Supreme Court Precedent.

Petitioners filed their motion for leave to intervene[3] ten days after the District Court first imposed on them a

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3. This motion was accompanied by the requisite "pleading setting forth the claim or defense for which intervention [was] sought." *See* Rule 24(c), Fed.R.Civ.P.

$1.95 property tax levy increase. Under the unusual circumstances surrounding Petitioners' new-found tax liability, the Court of Appeals' holding that Petitioners "had ample opportunity to file timely [intervention] applications" (App., A47) *prior to* entry of the September 15, 1987 taxation order is illogical and dangerous. It contravenes the purpose and intent of federal intervention principles enunciated in *NAACP v. New York*, 413 U.S. 345 (1973) and *Nevilles v. EEOC*, 511 F.2d 303 (8th Cir. 1975) (per curiam); it opens a Pandora's Box of interpretations that will subject federal trial courts to endless speculative applications premised upon what trial courts "might do" or may be "thinking of doing." Considering "all the circumstances," Petitioners' request was timely and denial was an abuse of discretion. *NAACP v. New York, supra*, 413 U.S. at 365-66; Rule 24(a)(2), Fed.R.Civ.P. *See Corby Recreation, Inc. v. General Electric Company*, 681 F.2d 175, 176 n.1 (8th Cir. 1978).

The lower courts concluded Petitioners should have moved for intervention earlier—prior to the entry of the September 15, 1987 taxation order—for two reasons: First, because the District Court previously had discussed its "ability . . . to raise taxes to fund its desegregation remedy" and, in 1985, had actually enjoined the Proposition C property tax levy rollback required under Missouri law. (App., A84 & A48.) Second, because, in a July 6, 1987 order, the District Court "stated its intention 'to generate KCMSD's portion of the desegregation funding through imposition of either an earnings tax or a state income tax surcharge' "—an "intention . . . reported by the local news media." (App., A84 & A48.) The appellate panel concluded that, "[t]aken together, the orders were more than sufficient . . . to put [taxpayers] on notice

that their interests *would be affected* by" future District Court funding orders. (*Id.*, A48 (emphasis added).)

These statements and actions of the District Court do not provide actual or constructive notice of the District Court's ultimate property and income taxation schemes sufficient to constitute due process any more than they establish a Rule 24(a)(2) interest sufficient to permit Petitioners' intervention prior to September 15, 1987. Taxpayers are neither obliged nor allowed to file tenuous actions premised on the dicta of federal courts.

The previous Proposition C rollback seizure represents a type of tax levy—and justiciable interest—distinct from the two taxes subsequently imposed by the September 15, 1987 order. The courts' reasoning that somehow property taxpayers waived their right to intervene to fight these significant tax increases simply because they did not challenge the relatively inconsequential rollback seizure is erroneous. It is analogous to asserting that because Farmer Jones did not sue the tractor manufacturer when his rig cut off his finger in 1957, he cannot sue the manufacturer when the tractor tears off his arm in 1987.

The courts' analysis of the assumed forewarning effect of the District Court's July 6, 1987 order also is insightful. Presumably, all Kansas City area taxpayers are to take speculative legal action based on a trial court's expressed "intention" to raise taxes. But would the District Court seriously have considered a taxpayer intervention plea on July 7, 1987? Who should sue? What would be the prayer? The conjecture is endless, as would be the volume of "protective" motions to intervene necessary to safeguard all contingent, even remote, taxpayer interests. How can someone challenge the validity of a judicially-

imposed tax if it has not yet been established in some detail? Even after September 15, 1987, subsequent modifying orders continued to change the use, nature and implementation of the court's taxes.[4]

What little news media coverage existed only amplified the confusion. The record below consisted of but one newspaper article that provides a perfect illustration of the type of ambiguous and contradictory "notice" given taxpayers as to how, what and when their interests "would be affected" by court action. School officials and plaintiffs' counsel randomly, even erroneously, speculated on the magnitude and types of taxes to be expected from the District Court, to the point of suggesting that a property tax increase would be less likely than an income surtax. While the July, 1987 order and article mentioned a possible earnings tax or surcharge, neither informed taxpayers that a massive court-ordered $1.95 property tax increase would be forthcoming.

The bizarre circumstances of this case do not provide the concrete indicia of clearly-delineated court action required by *NAACP v. New York,* 413 U.S. at 366-67. Petitioners' ten-day-old request for intervention was timely.

B. Petitioners Satisfied All Other Requirements For Intervention Of Right Under Rule 24(a)(2).

Neither court below questioned Petitioners' ability to satisfy the basic requisites for intervention of right. *See* Wright, Miller & Kane, *Federal Practice and Procedure*:

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4. By analogy, taxpayers' judicial challenges to a legislative taxation scheme would not be ripe until the legislative body had actually enacted the body of law subject to challenge. One could not file suit simply on the basis of reported committee hearings, amendments, floor debates, etc.

Civil 2d Section 1908 at 262 (2d ed. 1986); *Corby Recreation, supra,* 581 F.2d at 176; *Meyer Goldberg, Inc. of Lorain v. Goldberg,* 717 F.2d 290, 292 (6th Cir. 1983). Petitioners' property interest in the court-ordered tax liability is uncontroverted. *Donaldson v. United States,* 400 U.S. 517, 531 (1971). The impairment of this interest resulting from any affirmance of the judicial property taxation scheme is likewise certain. Finally, Petitioners' financial interests cannot be adequately represented by the existing parties in the litigation since all litigants, including joint and several tortfeasor the State of Missouri, benefit from the creation and implementation of a court-ordered or -approved property tax to generate supplemental revenues for funding the State's and the KCMSD's remedial desegregation responsibilities. *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 538 n.10 (1972).

These conclusions were validated by the District Court's recent decision to permit taxpayer intervention in the remanded desegregation proceedings to pursue a full refund of the unconstitutional income tax surcharge collections.

II.

THE LOWER COURTS' ERRONEOUS DENIAL OF PETITIONERS' INTERVENTION INFRINGED PETITIONERS' FUNDAMENTAL RIGHT TO PROTECT THEMSELVES FROM AN UNCONSTITUTIONAL SEIZURE OF THEIR PROPERTY BY A FEDERAL JUDGE'S UNPRECEDENTED DECISION TO LEVY PROPERTY TAXES.

Petitioners have pursued their appeal in this case to challenge the constitutionality of judicial taxation. Their objective is to stop the tax and protect their property;

they are not in this litigation solely to establish Rule 24 precedent. Recognizing the limitations of their status in the certiorari process, Petitioners nevertheless offer these insights into judicial taxation issues of "exceptional importance." (App., A53.)

A. The Judicial Taxation Scheme Constructed By The Lower Courts Exceeds The Limitations On The Federal Judiciary's Power Under Article III And Contravenes Fundamental Principles Of Constitutional Self-Governance.

The lower courts have concluded that the federal judiciary is empowered under Article III of the Constitution to levy taxes in order to remedy constitutional wrongs.

Before we readily accept this breathtaking expansion of judicial authority, it is imperative that we recognize the Framers' creation of a federal judicature designed to "always be the least dangerous" branch of government "to the political rights of the constitution." *The Federalist No. 78* (Hamilton). The judiciary was to have "no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and [could] take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." *Id.* Neither the history of our experiment in self-government nor relevant Supreme Court precedent authorize the federal courts to take such a dramatic course of political action as that taken by the lower courts in this case.

1. Taxation principles.

A first principle of American political thought, a premise forwarded by the philosopher John Locke which permeates both the Declaration of Independence and the United States Constitution, is that the power of the state is justified by the consent of the governed. Locke's consent theory served as a cornerstone for numerous written compacts central to this nation's political and legal development, including the Mayflower Compact, colonial charters, and the Declaration of Independence. The concept of representative taxation was simply a particular application of the consent theory, with roots deep in English constitutional history.[5] Locke is credited with delivering "the first great statement of fiscal limitation," J. Adams, *Secrets of the Tax Revolt* at 26 (Harcourt Brace 1984), *viz.*, the legislative branch "must not raise taxes on the property of the people without the consent of the people, given by themselves or their deputies." J. Locke, *The Second Treatise on Government* at 81 (Bobbs-Merrill ed. 1952).

"To the extent that taxation and representation did reflect the will of those persons who bore the principal burden of paying taxes, the English and American systems were, in truth, a matter of voluntary giving." F. McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* at 26-27 (University Press of Kansas 1985). The representative nature of the gift, or tax, is of crucial importance. "[I]t was the pivotal point in

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5. *See* The Massachusetts Resolves of October 29, 1765: "Resolved, that no Man can justly take the Property of another without his Consent: And that upon this original Principle the Right of Representation in the same Body, which exercises the Power of making Laws for levying Taxes, which is one of the main Pillars of the British Constitution, is evidently founded."

bringing about the American Revolution, and was subsequently incorporated into every constitution in the United States." *Id.* at 28. In a speech on the Declaratory Bill, William Pitt was most eloquent: "Taxation and representation are inseparable: this position is founded on the laws of nature; it is itself an eternal law of nature; for whatever is a man's own, is absolutely his own; . . . Taxation and representation are coeval with, and essential to, this constitution." *Bristol* (England) *Gazette*, Mar. 24, 1774 (speech of William Pitt on the Declaratory Bill).

Thomas Jefferson cohered these principles in the Declaration of Independence with the affirmation "Governments are instituted among Men, deriving their just powers from the consent of the governed." Jefferson cited the tyrannical King George III "For imposing Taxes on us with out our Consent" and "For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments."

Representative taxation eventually found its way into the document formed in Philadelphia in the summer of 1787. Where the Articles of Confederation had given the central government no power to levy taxes, the new Constitution provided that "The Congress shall have Power . . . To lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, Section 8. Nowhere in the Constitution is the federal judiciary empowered to "lay and collect Taxes" of any kind or for any purpose. Such would be incompatible with a federal judicature intended to have "no influence over either the sword or the purse," the branch intended to have "neither Force nor Will, but merely judgment." *The Federalist*

No. 78, supra. Chief Justice John Marshall ratified the constitutional primacy of representative taxation in *Providence Bank v. Billings and Pittman,* 29 U.S. (4 Pet.) 514 (1830), when he stated that "the interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise taxation." *Id.* at 563.

The decisions of this Court have consistently safeguarded the principle of representative taxation. In *Rees v. City of Watertown,* 86 U.S. (19 Wall.) 107 (1873), the Supreme Court stressed:

> This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purpose only; and, second, by the power of legislative authority only. It is a power not extended to the judiciary. Especially it is beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important.

Id. at 116. *See Meriwether v. Garrett,* 102 U.S. 472, 512 (1880) (Field, J., concurring) ("The levying of taxes is not a judicial act. It has no element of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare."). *See also Yost v. Dallas County,* 236 U.S. 50 (1915); *Thompson v. Allen County,* 115 U.S. 550 (1885). "The substitution of government by the federal judiciary for local self-government involves dangerous disproportionality; it sacrifices fundamental democratic values in order to vindicate particular constitutional rights." Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies,* 30 Stan. L. Rev. 661, 664 (1978).

One cannot justify unrepresentative judicial taxation by its objective. Honorable ends do not justify illegitimate means. The balance between the valid use and abuse of judicial authority is extremely delicate. "In short, judicial self-restraint and judicial power seem to be the opposite sides of the same coin: it has been by judicious application of the former that the latter has been maintained. . . . [Judicial power] has been maintained by a wise refusal to employ it in unequal combat." R. Tresolini, *American Constitutional Law* at 65 (2d ed. 1965) (*quoting* J. Roche, *Judicial Self-Restraint,* 49 Amer. Pol. Sci. Rev. at 722 (Sept. 1955)). The lower courts' employment of judicial power to tax Petitioners threatens the integrity of judicial authority itself.

2. The lower courts' levying of property taxes directly conflicts with this Court's Griffin decision.

Both the District Court and the Court of Appeals seize their power to impose unrepresentative tax increases by misstating and misapplying this Court's holding in *Griffin v. County School Board of Prince Edward County,* 377 U.S. 218 (1964). The courts' analyses starkly illustrate the dangers of the slippery slope mechanism of judicial interpretation, incrementally vesting the judiciary with ever-expansive powers, leading ultimately to a judicially-recognized judicial power to impose unrepresentative taxes without any constitutional support.

In *Griffin,* the Supreme Court held that local county officials could not circumvent integration of the public schools under *Brown v. Board of Education,* 347 U.S. 483 (1954), by refusing to open and operate tax-supported public free schools. The Court noted that the county

board of supervisors had "the special responsibility to levy local taxes to operate public schools." 377 U.S. at 232. The Court concluded that the trial court "may if necessary to prevent further racial discrimination, *require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate* to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." *Id.* at 233 (emphasis added). It is manifest the Court did not itself order a tax levy increase, nor did the Court authorize the trial court to increase property tax levies or impose income tax surcharges for desegregation programs of its own contrivance. Most importantly, the *Griffin* Court did *not* state that a local property tax "may be increased" by a federal trial court "if necessary to raise funds adequate to . . . operate" a nondiscriminatory public school system, as the District Court concluded in its September 15, 1987 order. (App., A78.)

This more restrained interpretation of *Griffin* is perfectly consistent with the Supreme Court's decision just three years before in *Moses Lake Homes, Inc. v. Grant County,* 365 U.S. 744 (1961), a case involving a state's evaluation and taxation of federal statutory leaseholds. A unanimous Court reversed the Ninth Circuit's decision to remand the case to the district court to allow the trial court "to make the necessary adjustment" of discriminatory state taxes levied against federal lessees, and opined:

> The effect of the [Ninth Circuit's] remand was to direct the District Court to decree a valid tax for the invalid one which the State had attempted to exact. The District Court has no power so to decree.

> Federal courts may not assess or levy taxes. Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one.

Id. at 752.

In another school desegregation case, *Plaquemines Parish School Board v. United States,* 415 F.2d 817 (5th Cir. 1969), the court duly noted the *Griffin* precedent and recognized that it "must be considered a unique case." *Id.* at 833. The Fifth Circuit observed: "The Prince Edward County schools were closed and the court directed that they be reopened and that taxes be levied and collected to operate them. The subjects of levy, tax rates, and collection methods were left to the commands of state law under state standards." *Id.*

It was not until 1975, in the case of *United States v. Missouri,* 515 F.2d 1365 (8th Cir.), *cert. denied,* 423 U.S. 951 (1975), that a new spin was given to *Griffin.* In *United States v. Missouri,* the trial court ordered the consolidation of three St. Louis suburban school districts and, after concluding that none of the three disparate tax rates would be sufficient "to effectively operate the desegregated district," 515 F.2d at 1371, ordered the new uniform levy to be set at a rate higher than the highest voter-approved rate of the consolidated districts.

The Eighth Circuit reduced the new consolidated district rate to the highest voter-approved rate of the three districts. As support, the Eighth Circuit relied on state taxation and annexation precedent. *Id.* at 1373. Although the appellate court did not approve the district court's setting of an increased levy, it concluded "[w]e are satis-

fied that the district court had the authority to implement its desegregation order by directing that provision be made for the levying of taxes essential to the operation of the new school district." *Id.* at 1372-73.

A decade later, in *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984), the federal judiciary's taxation power was expanded slightly further. There, the district court had ordered an interdistrict remedy and enjoined a scheduled reduction in the City of St. Louis school board's operating levy otherwise required by Missouri's property tax rollback statute to the extent the revenue would be needed to fund the City school board's share of desegregation costs. The district court reserved the authority to order an increase in the district's property tax levy if revenues were insufficient to desegregate city schools. 731 F.2d at 1300-01.

The Eighth Circuit affirmed the deferral of the rollback and held that the district court's "broad equitable powers to remedy the evils of segregation include a narrowly defined power to order increases in local tax levies on real estate," *id.* at 1320, a power to be "exercised only after exploration of every other fiscal alternative." *Id.* The *Liddell* court then read into *Griffin* the proposition that "the Supreme Court [had] acknowledged that the district court may order an increase in taxes to fund schools where the State has defaulted on its obligations to provide an equal educational opportunity to all students." *Id.* The *Liddell* court reached this conclusion by reasoning that the Supreme Court in *Griffin* "did not limit the scope of its holding by ordering a return to the previous tax levy or procedures," but "indicated only that the tax must be 'necessary to prevent further racial discrimination.'" *Id.*

Of course, the consequence of this reasoning contradicts the proffered proposition: the *Liddell* district court in effect increased the taxes of a select few taxpayers to fund the desegregation obligations of the State, obligations presumably to be shared by all State taxpayers. Moreover, this reasoning misconstrues *Griffin,* a fact not lost on one of the dissenters in *Liddell* who observed that the Supreme Court in *Griffin* had simply ordered school officials "to restore a tax illegally abolished, but specifically left the manner of levy and the amount and the means of collection to procedures under state law and standards." *Id.* at 1332 (Gibson, J., dissenting). This interpretation is buttressed by the Court's analysis in *Moses Lake Homes, Inc. v. Grant County, supra,* where this Court concluded that the federal judiciary's jurisdiction was limited to determining whether taxes levied were valid and did not extend to the assessment and levy functions.

The *Liddell* dissent most succinctly framed the issue in these terms:

> I have no quarrel with the proposition that, with proper findings that particular programs are necessary to remedy a constitutional violation that has been found to exist, a district court has the power to order the funding of those programs. The order should simply be in the form, however, to mandate that certain programs be carried out, and legislative bodies should be left with the responsibility for structuring the local or state taxing instrumentalities to achieve the result required. The federal courts go too far in mandating specific taxing procedures.

Id. (Gibson, J., dissenting). *See id.* at 1333 (Bowman, J., dissenting) ("I join in . . . [the] well-reasoned dissent

concerning . . . the singular inappropriateness in our Constitutional system of a federal court's ordering state and local taxing authorities to impose specific tax increases.").

Now we find the lower courts relying on *Griffin* for the proposition that a federal court can double a property tax levy for taxpayers not parties to the federal litigation, individuals who have never been held liable for the constitutional violations of the party defendants. If the lower courts' taxation decisions are upheld, there is no principled reason for limiting a federal court's creation and imposition of *any* tax to remedy *any* constitutional wrong.[6]

The Court of Appeals' entire discussion affirming the court-ordered tax levy is devoid of any constitutional provision, historical argument, or apposite Supreme Court precedent that support the premise that the federal judiciary is expressly empowered under Article III to impose taxes to generate revenues to fund court-ordered remedies. The opinion alleges a judicial power "to determine a remedy," but goes no further to cite historical support for a judicial power to legislate a new tax to fund a remedy. (App., A30-A31.) The opinion submits that the Tenth Amendment and the principle of separation of powers "simply have no bearing on the district court's options in enforcing its judgment" regarding the judicial

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6. Interestingly, in *Reece v. Gragg*, 650 F. Supp. 1297 (D. Kan. 1986), a district court enjoined the further unconstitutional operation of an overcrowded county jail, but refused to order capital expenditures for the construction of a new jail, stating:

> This Court has no reservoir of funds nor any suggested method of raising funds for the construction of a minimally sufficient jail. The Court has no architects, engineers or general contractors standing by. Even if this Court could order a new jail built, it would not do so. A decision such as that is a decision to be made by the political process, not by judicial fiat.

650 F. Supp. at 1306.

property tax (*id.*, A31), but fails to explain[7] why one or both of these constitutional doctrines support the reversal of the judicial income tax surcharge, which was deemed to have "invaded the province of the legislature." (*Id.*, A44.)

The judicial levying of taxes circumvents the political process; it substitutes a direct assessment of damages, in the form of taxes, against those not parties to the litigation in lieu of a judgment against the constitutional tortfeasors, the political entities responsible for resolving political crises like the one facing the KCMSD. *Griffin* cannot be viewed as bestowing a broad grant of power to the federal judiciary to levy new taxes to fund court-ordered remedies. A federal court's equitable powers are not unlimited in matters of state law and taxation. *See Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40-44 (1973). *See also* McDowell, *A Scrupulous Regard for the Rightful Independence of the States: Justice Stone and the Limits of the Federal Equity Power*, 7 Harv. J. L. & Pub. Policy 507, 507-08 (1984).

3. Application of joint and several liability principles, in lieu of judicial property taxation, is the appropriate judicial remedy in this case.

Obviously, the lower courts did have an alternative to levying their own property taxes to fund the desegregation obligations of the State of Missouri and the KCMSD. The

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7. While the opinion discusses some practical considerations for this distinction, there is no constitutional justification cited for permitting the creation of a judicial property taxing power as an option in enforcing court judgments but not a judicial income taxing power.

courts could, and should, have assessed the necessary desegregation costs against its two joint and several tortfeasors and let the political processes determine how revenues to pay the damages will be raised.

In his dissent against the property tax, Chief Judge Lay pointed out that liability for desegregation funding between the State and the KCMSD "was based upon a finding of joint and several tortfeasors." (App., A50.) Judge Lay concluded:

> Thus, I do not feel that it was necessary for the district court or feasible for this court to approve a property tax levy by KCMSD to meet its fiscal responsibility. Where other alternatives remain, it is the very essence of judicial restraint not to go beyond the relief necessary. . . . I therefore would set aside the property tax levy ordered by the district court and use existing legal principles to effect constitutional compliance by holding the state liable for any deficiency KCMSD cannot contribute under the plan.

(*Id.*, A51-A52.)

The Court of Appeals' decision relied on State joint and several liability funding to aid the KCMSD in its anticipated shortfall due to the surcharge reversal. (*Id.*, A45.) The court even recognized the availability of State joint and several funding in the event the court-approved property tax levy limitation results in insufficient resources to meet desegregation costs. (*Id.*, A41 n.18.) Considering the finding of joint and several liability, the courts' imposition of property taxes was an erroneous judicial remedy.[8]

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8. The Eighth Circuit majority opinion did recognize the need to "modify [the property tax scheme's] future operation

(Continued on following page)

B. Petitioners' Exclusion As Parties Below Jeopardized Their Due Process Right To Challenge The Unconstitutional Seizure Of Their Property Through A Federal Court-Ordered Tax.

In its most basic form, due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). *See* U.S. Const. amend. V; *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). *See Cleveland Board of Education v. Loudermill,* ..... U.S. ....., ..., 105 S. Ct. 1487, 1494 (1985) (tenured public employee is guaranteed notice of the charges against him and an opportunity to present "his side of the story"). Due process "incorporates notions of fair notice or warning," *Postscript Enterprises, Inc. v. Whaley,* 658 F.2d 1249, 1254 (8th Cir. 1981); it guarantees an aggrieved party the opportunity to present a case and have its merits fairly judged through "some form of hearing" before that party can be deprived of a protected interest. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433 (1982) (*citing Board of Regents v. Roth,* 408 U.S. 564, 570-71 (1972)). Although applying the Due Process Clause is an uncertain enterprise, courts must discover what "fundamental fairness" consists of in a given situation. *See Lassiter v. Department of Social Services of Durham County,* 452 U.S. 18 (1981).

Footnote continued—

to more closely comport with limitations upon our judicial authority." (App., A6.) This modification—empowering the local school board to set future levy increases without a vote of the people subject to court approval—still does not remove the constitutional infirmities discussed above. *See* II.A.1 and II.A.2, *supra.*

There was no semblance of fairness or due process by the District Court when it levied taxes on Petitioners and then denied their request for intervention. Although not liable for the constitutional violations complained of, Petitioners, and other Kansas City area taxpayers similarly situated, have been deprived of their property in the exaction of remedial damages owed by someone else —and all without ever having had their day in court.

Petitioners' right to utilize the judicial process to protect their interests in challenging court-ordered property taxes persists. Although Petitioners were allowed to participate as *amici curiae*, their present inability to squarely present to this Court constitutional challenges to the judicial taxation scheme now in place threatens their property interests. Even if the State of Missouri petitions for review of the judicial property tax question (among numerous other complex desegregation issues), it is almost certain the State will not be advancing one of Petitioners' primary contentions, that the property tax be reversed and substituted with additional State funding under joint and several liability principles. Petitioners must be allowed to present "their side of the story."

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge this Honorable Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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January 11, 1989

88-1194

No.

Supreme Court, U.S.
FILED
JAN 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

ICELEAN CLARK, *et al.*,
Petitioners,

vs.

KALIMA JENKINS, *et al.*,
Respondents,

vs.

THE STATE OF MISSOURI, *et al.*,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX

(Filed August 19, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1934
No. 86-2537
No. 87-1749
No. 87-2299
No. 87-2300
No. 87-2588

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, Barbara Pugh; Cynthia Winters, by her next friend, David Winters; on behalf of themselves and all others similarly situated,

and

American Federation of Teachers, Local 691,
Appellees,

v.

The State of Missouri, Honorable John Ashcroft, Governor of the State of Missouri, Wendell Bailey, Treasurer of the State of Missouri, Missouri State Board of Education,

Roseann Bentley,
Dan Blackwell,
Terry A. Bond, President,
Delmar A. Cobble,
Grover Gamm,
Jimmy Robertson,
Robert L. Welling,
Donald E. West,
Members of the Missouri State Board of Education,

Arthur L. Mallory, Commissioner of Education of the State of Missouri,
Appellants,

and

School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof,
Appellees.

No. 87-2565

Kalima Jenkins, by her friend, Kamau Agyei, et al.,

and

American Federation of Teachers, Local 691,
Appellees,

v.

The State of Missouri, et al.,

and

School District of Kansas City, Missouri, et al.,
Appellees.

Icelean Clark; Bobby Anderton; Eleanor Graham; John C. Howard; Craig Martin; Gay D. Williams; Kansas City

Mantel & Tile Co.; Coulas & Griffin Insurance Agency, Inc.; Sharon Dunham; Lindsay K. Kirk; Linda Frazier; Rick Feierabend; Linda Hollenbeck; James Hollenbeck; Susan Horseman; and Clifford M. Horseman,
Appellants.

No. 87-2589

Kalima Jenkins, by her friend, Kamau Agyei, et al.,

and

American Federation of Teachers, Local 691,

v.

The State of Missouri, et al.,

and

School District of Kansas City, Missouri, et al.,
Appellees.

Icelean Clark; Bobby Anderton; Eleanor Graham; John C. Howard; Craig Martin; Gay D. Williams; Kansas City Mantel & Tile Co.; Coulas & Griffin Insurance Agency, Inc.; Sharon Dunham; Lindsay K. Kirk; Linda Frazier; Rick Feierabend; Linda Hollenbeck; James Hollenbeck; Susan Horseman; and Clifford M. Horseman,
Jackson County, Missouri;
Appellants.

No. 87-2659

Kalima Jenkins, by her friend, Kamau Agyei, et al.,
Appellants,

and

American Federation of Teachers, Local 691,

v.

The State of Missouri, et al.,
Appellees,

and

School District of Kansas City, et al.,
Appellees.

No. 88-1073

Kalima Jenkins, by her friend, Kamau Agyei, et al.,
Appellees,

and

American Federal of Teachers, Local 691,

v.

The State of Missouri, et al.

and

School District of Kansas City, Missouri, et al.,
Appellees,

Jackson County, Missouri; William Waris; Bernice J. Conley; Gary Panetheire; Beverly O. Ross; Michael Bendergast, their officials,
Appellants.

No. 88-1456

Kalima Jenkins, by her friend, Kamau Agyei, et al.,

and

American Federation of Teachers,
Local 691,

v.

The State of Missouri, et al.,
Appellees,

and

School District of Kansas City, et al.,
Appellants.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: March 21, 1988
Filed: August 19, 1988

Before LAY, Chief Judge, HEANEY and JOHN R. GIBSON, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The Kansas City School District desegregation case is before us again and we now must consider the scope of the remedies ordered by the district court,[1] specifically with respect to magnet schools and capital improvements, and the tax increases authorized to generate the Kansas City, Missouri School District's share of the costs of these programs.[2] We affirm the judgment of the district court with respect to scope of the remedy as to magnet schools and capital improvements with some slight modifications.

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1. The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

2. This appeal raises the propriety of some thirteen district court orders: those of June 16 and November 12, 1986, April 29, July 6, August 19, August 24, September 15, October 27, and November 13, 16, and 23, 1987, January 7, 1988, and March 1, 1988.

While we approve the order and conclusions of the district court with respect to the property tax, we modify its future operation to more closely comport with limitations upon our judicial authority, and we reverse that part of the district court's order establishing an income tax surcharge.

In this case the district court dealt with undisputed constitutional violations and its series of orders were necessary to remedy the lingering results of these violations, since local and state authorities had defaulted in their duty to correct them. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (*Brown II*).

The Supreme Court has provided broad guidelines for the district courts in such cases. In *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), the Court set forth a three part analysis of the district court's remedial power:

> In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to 'the *condition* alleged to offend the Constitution . . . .' Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.

433 U.S. at 280-81 (citations omitted).

Our standard of review of the district court's actions within these limiting legal principles is restricted: "[T]he choice of remedies to redress racial discrimination is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court." *United States v. Paradise*, 107 S. Ct. 1053, 1073 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 508 (1980) (Powell, J., concurring)); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1236 (2d Cir. 1987), *cert. denied*, 1988 W.L. 62301, 62303 (June 13, 1988) (Nos. 87-1632, 1686). We have also recognized the importance of the district court's factual findings, which may not be disturbed unless clearly erroneous. Fed. R. Civ. P. 52(a); *Jenkins v. Missouri*, 807 F.2d 657, 666-67 (8th Cir. 1986) (en banc) (*Jenkins I*), *cert. denied*, 108 S. Ct. 70 (1987).

Bearing in mind these limitations on the district court's remedial power and on our scope of review, we turn to the constitutional violations identified by the district court.

The State has admitted and the district court judicially noticed that Missouri mandated segregated schools for black and white children before 1954. *Jenkins v. Missouri*, 593 F. Supp. 1485, 1490 (W.D. Mo. Sept. 17, 1984). KCMSD established and maintained segregated facilities with segregated staffs. There are still vestiges of the dual school system lingering in KCMSD, and KCMSD and the State have not met their obligations to disestablish that system. 593 F. Supp. at 1504.

The district court further found that "the inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District." 593 F. Supp. at 1492. "[W]itnesses confirmed the conclusion reached by the Supreme Court

in *Brown I* [*Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)] that forced segregation ruins attitudes and is inherently unequal * * *. The general attitude of inferiority among blacks produces low achievement which ultimately limits employment opportunities and causes poverty." 593 F. Supp. at 1492 (citations to the record omitted). "Segregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD." *Jenkins v. Missouri*, 639 F. Supp. 19, 24 (W.D. Mo. June 14, 1985) (citations to record omitted) (emphasis in original).

The district court found that segregation in KCMSD caused the departure of the whites in the system to private schools and to the suburbs. Order of Aug. 25, 1986, slip op. at 1-2. *See also* Order of November 12, 1986, slip op. at 3. During the years between *Brown I* and trial, the enrollment of KCMSD shifted from predominantly white to predominantly black. In the 1958-59 school year, blacks constituted 22.5% of KCMSD enrollment, but by 1983-84 enrollment was 67.7% black and white enrollment had dropped 80%. 593 F. Supp. at 1495. "[A]s of 1974, 20 years after *Brown I*, 39 schools were more than 90% black * * *. Eighty percent of all blacks in the District attended schools that were 90% black * * *." *Id.* at 1492-93. KCMSD later reduced the number of over-90%-black-enrollment-schools, but the district court found in 1984 that KCMSD had still not completely dismantled the dual system. *Id.*

In discussing KCMSD's school buildings the district court made the stark finding that "[KCMSD's] physical facilities have literally rotted." *Jenkins v. Missouri*, 672 F. Supp. 400, 411 (W.D. Mo. Sept. 15, 1987). Specifically, the court found that "the overall condition of the KCMSD school buildings, particularly the interiors, is generally depressing and thus adversely affects the learning environ-

ment and continues to discourage parents who might otherwise enroll their children in the KCMSD." *Id.* at 403 (citations to record omitted). The district court found there were "numerous health and safety hazards, educational environment hazards, functional impairments, and appearance impairments" in the KCMSD's facilities, and catalogued examples of these problems and the evidence of them before the court. *Id.* at 403.

The district court made findings that both KCMSD and the State had caused the decay of the KCMSD's buildings. The court specifically found that "even if the State * * * did not directly cause the deterioration of the school facilities, it certainly contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools." Order of November 12, 1986, slip op. at 4; *accord,* 672 F. Supp. at 403.

In response to these findings of vestiges of unconstitutional segregation, the court ordered remedial programs involving magnet schools and capital improvements.

The magnet plan provided that by 1991-92 every high school and middle school in the KCMSD and about half the elementary schools would become magnet schools with one or more distinctive themes, such as foreign languages, performing arts, and math and science. Order of Nov. 12, 1986, slip op. at 2. The elementary magnets were to be located at selected sites throughout KCMSD, with at least one magnet in each area of the KCMSD.[3]

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3. The principal orders instituting the magnet schools plan were that of June 16, 1986, calling for expenditure of $12,972,727, of which the state was liable for $6,665,634, slip op. at 19; and November 12, 1986, calling for expenditure of $142,736,025, of which the State was solely liable for $89,877,724 and jointly and severally liable with KCMSD for the remainder. Slip op. at 6.

The district court also ordered a capital improvements program for KCMSD totaling some $260 million.[4] The principal capital improvement plan called for the closing of some eighteen KCMSD school facilities, construction of seventeen new facilities and renovation of others. 672 F. Supp. at 405. The portion of the plan the court ordered to be funded is scheduled for completion by the fall of 1990. *Id.*

In considering its final capital improvement order the district court gave specific attention both to KCMSD's proposal and the State's alternate proposal calling for approximately $61 million in renovations. *Id.* at 403-05. It rejected the State's recommendations as an inadequate "patch and repair" approach which would not serve the remedial goals established by the court, *id.* at 404, and concluded that the limited renovation the State proposed would result in the schools continuing to be "unattractive and substandard, and would certainly serve as a deterrent to parents considering enrolling their children in KCMSD schools." *Id.* at 405.

To enable KCMSD to fund its share of the costs of the desegregation plan, the district court imposed a 1.5 percent surcharge on income of residents and non-residents of KCMSD subject to the Missouri State income tax

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4. The court ordered expenditure of $12,877,330 for capital improvements in its order of June 16, 1986, all of which was to be paid by the State, slip op. at 15; $52,858,301 in its order of November 12, 1986, for which the State and KCMSD were jointly and severally liable, slip op. at 5; $7,376,135 in its order of April 29, 1987, for which the State and KCMSD were jointly and severally liable, slip op. at 3; $353,061 in its order of July 7, 1987, slip op. at 12; and $187,450,334 in its order of September 15, 1987, for which the State and KCMSD were jointly and severally liable, with equal contribution, 672 F. Supp. at 408. Capital improvements ordered earlier have already been affirmed. *Jenkins I*, 807 F.2d at 685.

"for work done, services rendered and business or other activities conducted within the KCMSD." *Jenkins*, 672 F. Supp. at 412. The court also ordered the district's property tax levy to be increased to $4 per $100 assessed valuation through the 1991-92 fiscal year, and authorized KCMSD to issue $150,000,000 in capital improvement bonds, to be retired within twenty years. *Id.* at 413.

I.

The district court's remedial orders were based on the elementary principle that the victims of unconstitutional segregation must be made whole, and that to make them whole it will be necessary to improve their educational opportunities and reduce their racial isolation. The foundation of the plans adopted was the idea that improving the KCMSD as a system would at the same time compensate the blacks for the education they had been denied and attract whites from within and without the KCMSD to formerly black schools. *See* Order of June 16, 1986, slip op. at 17. The long term goal of the district court's effort was therefore:

> to make available to *all* KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district. *In achieving this goal the victims of unconstitutional segregation will be restored to the position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment.*

Id. (emphasis added); *accord*, 639 F. Supp. at 54.

In later orders the district court explained how the magnet school and capital improvement plans would bring about these ultimate objectives. The court found "that the proposed magnet plan would generate voluntary student transfers resulting in greater desegregation in the district schools." Order of November 12, 1986, slip op. at 3. The court specifically stated:

> [T]he plan would provide both minority and non-minority district students with many incentives to leave their neighborhoods and enroll in the magnet schools offering the distinctive themes of interest to them. Most importantly, the Court believes that the proposed magnet plan is so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs.

Id.

The district court thus articulated three remedial goals needed to restore the victims to the position they would have occupied without the State and KCMSD's constitutional violations: first, to improve the educational lot of the victims of unconstitutional segregation; second, to regain some portion of the white students who fled the district and retain those who are still there; and third, to redistribute the students within the KCMSD to achieve the maximum desegregation possible.

The State argues that the goal of attracting non-minority students from private schools and suburban schools is not warranted by the nature of the constitutional violation unless KCMSD and the State committed a specific violation causing students to withdraw from the sys-

tem. The State argues that under *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*), a court remedying an intradistrict violation must simply strive to distribute students within the district evenly by race. But this court has held in *Jenkins I*, 807 F.2d at 683-84, and *Liddell v. Missouri*, 731 F.2d 1294, 1302-08 (8th Cir.) (en banc) (*Liddell VII*), *cert. denied*, 469 U.S. 816 (1984), that *voluntary* interdistrict remedies may be used to make meaningful integration possible in a predominantly minority district.

These holdings are bolstered by the district court's findings that the preponderance of black students in the district was due to the State and KCMSD's constitutional violations, which caused white flight. The district court found that the existence of segregated schools led to white flight from the KCMSD to suburban districts and to private schools.[5] *E.g.*, Order of Aug. 25, 1986, slip op. at 1-2.

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5. We asked the parties to provide agreed upon statistics for the number of children residing in the KCMSD who attend private schools, but they were unable to do so. Nevertheless, we are able to take notice of census figures on this subject for the City of Kansas City, though we realize its boundaries are not coterminous with those of the KCMSD. Census figures for 1980 show that about 17 percent of the school age children in Kansas City, Missouri are in private schools. U.S. Dept. of Commerce, Bureau of the Census, 1980 Census of Population, General Social and Economic Characteristics, Missouri 27-12 (1983). They further indicate that about 71 percent of the total Kansas City, Missouri population is white, U.S. Dept. of Commerce, Bureau of the Census, 1980 Census of Population and Housing, Advance Estimates of Social, Economic and Housing Characteristics, Missouri 27-61 (1983), and that about 60 percent (56,486) of the children ages 5-18 in Kansas City are white and about 37 percent (34,874) are black, *see* U.S. Dept. of Commerce, Bureau of the Census, 1980 Census of Population, General Population Characteristics, Missouri 27-54 (1982). The record in this case indicates that the KCMSD enrollment was approximately 68.3 percent black in 1985. See Order of June 14, 1985, slip op. at 31.

See also Order of November 12, 1986, slip op. at 3. This finding is implicitly recognized in the court's remedial orders with the express goal of attracting back the students who had left KCMSD schools.

These findings that the unconstitutional segregation caused the KCMSD to lose certain students form the basis for a remedy designed to attract such students back. Without regaining those students who have already fled, the desegregation effort in this case will take place in a school district with a preponderance (roughly 70%) of black students, despite its majority white population. Under such circumstances, the State's position would effectively defeat any possibility of meaningful integration.

The State argues that any consideration of white flight to the suburban districts runs contrary to our earlier holdings and to earlier findings of the district court. These arguments simply miss the mark. *Jenkins I* dealt with white flight in the context of a claim for interdistrict relief. We first note that three judges of this court would have found an interdistrict violation, 807 F.2d at 696 (Lay, C.J., dissenting), and that the four judges that concluded there was not such a violation concluded that KCMSD's segregation had no substantial segregative effect *in the SSD's*. *See id.* at 680-81. This finding concerning segregation in the SSD's is not inconsistent with a further finding that KCMSD's segregation caused it to lose significant numbers of its white students and that regaining those students is a necessary part of restoring the victims to the condition they would have enjoyed had there been no constitutional violation.

The State further argues that it cannot be responsible for the voluntary departure of white students from the

school district and that white flight "is usually a reaction to just the sort of change that federal courts seek to implement." State's Reply Brief at 9. This argument does not necessarily contradict the district court's findings that state-imposed segregation caused white flight and that the failure to eliminate the vestiges of discrimination contributed to the decline in the educational quality and physical plant of the KCMSD school system. In any event, such court-ordered integration would not have been necessary had the State not unconstitutionally mandated a dual school system and then failed to eliminate the vestiges of segregation.

The State also attacks the goal of improving the education of all KCMSD students, arguing that this remedial goal exceeds the scope of the violation, because it seeks to benefit all KCMSD students, not just those minority students who have suffered from the effects of the constitutional violations. Careful reading of the district court's order shows that the court did not view improving education for all KCMSD students as an end in itself, but as a means to serve the goals of restoring to the victims the education they have been denied and of attracting and maintaining whites in the KCMSD. *See* Order of June 16, 1986, slip op. at 17 (language quoted at p. 11, *supra*); 639 F. Supp. at 54. We cannot say that the district court abused its discretion in using system-wide educational enhancements to accomplish its legitimate desegregative objectives. Moreover, this court has approved remedial programs for the benefit of all students in a district where the children have been deprived of the right to a desegregated education. *See Little Rock School District v. Pulaski County Special School District No. 1,* 839 F.2d 1296, 1308 (8th Cir. 1988).

The State next argues that the findings of the district court do not identify statistics for student enrollment that would indicate that KCMSD had become a unitary school district. The State argues that without such findings, there can be no objective evaluation of whether the plans ordered are well-crafted to achieve unitariness.

The State's argument would have more force if we dealt only with a question of student assignment. We have before us a system-wide desegregation remedy involving magnet schools and capital improvements that is planned for completion over a five year period. One of the most complex questions in desegregation litigation is that of when a district has become unitary. We decline to give an advisory opinion on that issue, but leave it for consideration when the programs planned through the 1991-92 year have been implemented.

Next, the State argues that the magnet school plan adopted by the district court does not serve the court's avowed goals. These arguments attack the district court's factual findings and therefore must be reviewed under the clearly erroneous standard.

First, the State contends that the extent of magnet schools ordered exceeds the amount necessary to achieve uniform distribution of minority and majority race students at schools within the district, or even disserves the goal of uniform distribution.

The State argues that the plan simply includes too many magnet schools—that it is extravagant. The district court specifically addressed the State's concern over making magnet schools of all the senior high and middle schools and half the elementary schools. It observed

that in the ordinary magnet plan, because of limitations on the number of students who may be enrolled, "for each non-minority student who enrolls in the magnet school a minority student, who has been the victim of past discrimination, is denied admittance." Order of Nov. 12, 1986, slip op. at 3. It found that "[w]hile these plans may achieve a better racial mix in those few schools, the victims of racial segregation are denied the educational opportunity available to only those students enrolled in the few magnet schools. This results in a school system of two-tiers as it relates to the quality of education. This inequity is avoided by the KCMSD magnet school plan." *Id.* The State in its filings with the district court cautioned about creation of a two-tiered system of schools in which "existing schools are, or are perceived to be, markedly inferior." Response of State to KCMSD motion for approval of 1986-87 magnet programs, p. 12. The State's expert witness, Dr. Doyle, echoed this concern and suggested that one way to avoid the problem was to convert an entire school system to magnet schools. Tr. 376, 381-82, June 5, 1986. Another State's witness, Dr. Cooper, also agreed on cross-examination that the comprehensiveness of the plan was a step in the right direction. Tr. 890, Sept. 18, 1986. The district court's finding regarding the need for the number of magnet schools authorized by the plan is amply supported by the State's own evidence.

The State also argues that by locating magnet schools within white neighborhoods as well as black neighborhoods, the plan will defeat integration by allowing children to attend magnet schools within their own neighborhoods. The plan was fashioned to prevent such a result. The plan offers different themes in numerous

elementary schools in the district, some located close to suburban areas and others in heavily minority residential districts. The various schools should therefore draw students from all parts of the district and increase the desegregative opportunity. The plan builds upon this by providing middle and high school magnet programs, giving those attending elementary school magnets a strong incentive to stay in the district throughout their school years. The State's expert, Dr. Doyle, agreed that this feeder pattern would be desegregative. Tr. 808, Sept. 18, 1986.

The State also attacks the district court's findings that the magnet plan will provide schools that are attractive to whites not currently attending KCMSD schools. Order of Nov. 12, 1986, slip op. at 3. However, the State has pointed to no evidence in the record persuading us that this finding is clearly erroneous.

We conclude that the district court's finding that the magnet plan was properly designed to achieve voluntary desegregation is not clearly erroneous.

II.

The State attacks the scope of the capital improvements plan and argues that the plan was not fashioned to further the court's remedial goals.[6]

The district court found that the capital improvements program "is a proper remedy through which to remove the vestiges of racial segregation, and is needed

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6. The State also attacks the goals of the capital improvements plan. Since the capital improvements plan serves the same remedial goals as the magnet school plan, our magnet school discussion answers the State's arguments.

to attract non-minority students back to the KCMSD." Order of November 12, 1986, slip op. at 4. Moreover, because unconstitutional segregation was in part responsible for the decay of KCMSD's buildings, capital improvements were necessary to restore the victims to their rightful place. *Id.*

The State argues that the district court strayed from the dictates of *Milliken II* by failing to show that the State's constitutional violations caused the condition which the capital improvement programs were meant to remedy. It argues that the decay in KCMSD's schools occurred because KCMSD was unable to raise funds for maintenance from its taxpayers, and the district court made no findings that the voting by KCMSD voters was discriminatory, or that the State is legally responsible for the voting patterns. Thus, according to the State, the district court required it to remedy problems of decay that were not caused by the State's constitutional violations.

There are ample findings supporting the district court's conclusion that the State is partly to blame for the decay of KCMSD's facilities. The district court found that the State by its constitutional violations and failure to remove the vestiges of the dual school system "contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools." Order of November 12, 1986, slip op. at 4. It had earlier found that such lack of maintenance was "further evidence of the detrimental effects that segregation has had on this school district's ability to raise adequate resources." 639 F. Supp. at 41.

The State argues that the lack of funding of KCMSD is simply independent action of the voters of KCMSD

for which the State may not be liable. But there is support in the record for the court's findings that segregation and the failure to remove the vestiges of the dual school system contributed to the atmosphere preventing KCMSD from raising necessary funds. The findings of fact demonstrate a spiraling effect of white children leaving KCMSD schools and KCMSD's white constituency withdrawing its financial support from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle.[7]

Further, this argument advanced by the State attacks an aspect of the court's findings that was merely an alternative basis for its conclusion. The district court also found:

> The improvement of school facilities is an important factor in the overall success of this desegregation plan. Specifically, a school facility which presents safety and health hazards to its students and faculty serves both as an obstacle to education as well as to maintaining and attracting non-minority enrollment. Further, conditions which impede the creation of a good learning climate, such as heating deficiencies and leaking roofs, reduce the effectiveness of the quality education components contained in this plan.

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7. The Jenkins class argues that there was systematic refusal by taxpayers to vote levy increases or bond issues "dating from precisely the moment when the school district became majority black." Jenkins Brief at 20. They further argue that the black wards tended to give highest voter percentages in favor of revenue measures. The record tends to support these arguments, but as the district court did not base its findings of fact and conclusions of liability on this theory, we need say no more.

639 F. Supp. at 40. Even absent the findings that the State contributed to causing the decay, the capital improvements would still be required both to improve the education available to the victims of segregation as well as to attract whites to the schools.

In *Jenkins I*, we held that the district court's findings were sufficient to support its conclusion that capital improvements are necessary for successful desegregation. 807 F.2d at 685. We specifically recognized the findings that "conditions which impede the creation of a good learning climate * * * reduce the effectiveness of the quality education components contained in this plan." *Id.* (quoting Order of June 14, 1985 at 34).

Similarly, in *Liddell VII*, 731 F.2d at 1318-19, we affirmed an order requiring the State to pay one-half of the cost of a capital improvements program necessary to restore city facilities to a constitutionally acceptable level. The State filed a petition for certiorari directed to this issue, which was denied.[8] *See* Petition for Certiorari at 24-28, *Missouri v. Liddell*, 469 U.S. 816 (1984) (No. 83-1721).

The State further argues that the facility improvements are more than is necessary to carry out the educational components of the desegregation plan. However, the district court found that the overall condition of the school buildings "adversely affects the learning environment and continues to discourage parents who might

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8. We recognize that the Supreme Court has on a number of occasions commented on the lack of precedential value of such denials. *See generally* L. Stern, E. Gressman & S. Shapiro, Supreme Court Practice (6th ed. 1987) § 5.7. On the other hand, we have earlier commented that such denials "cannot be overlooked." *Wells v. Meyer's Bakery*, 561 F.2d 1268, 1275 (8th Cir. 1977).

otherwise enroll their children in the KCMSD." 672 F. Supp. at 403. The district court catalogued the poor conditions prevailing in KCMSD's school buildings. *Id.;* 639 F. Supp. at 39-40. Certainly defective lighting, inadequate heating, stench from toilet facilities, and other conditions affecting the appearance of the schools and comfort of the students affect not only the quality of education that may be obtained there, but also whether parents will withdraw their children from such schools or reenroll them there.

Finally, the State attacks certain aspects of the capital improvements plan as extravagant. We have examined the many instances the State points out and conclude there was substantial testimony demonstrating the justification for these portions of the plan. We mention only one example of the State's objections. The State objected to a 25 acre farm and 25 acre wildland area that had been ordered for the magnet schools. State's Brief at 56. However, a similar twenty-three acre museum and laboratory in a science program at Shawnee Mission South High School in Shawnee Mission, Kansas (which lies approximately a mile to the west of the southern portion of KCMSD) was recently commended by Secretary of Education William J. Bennett. James Madison High School, A Curriculum for American Students 34 (1987). The findings of the district court demonstrate that the capital improvements program is essential to assure the quality of education and future success of the magnet schools necessary to remedy the constitutional violations in KCMSD.

From materials that have been filed with us concerning the financial needs of the KCMSD, it is apparent that the capital improvements plan that we affirm today does not cover all expenditures that may be necessary between

now and the 1991-92 school year, specifically some $16 million for land acquisition and asbestos removal costs. We are informed by the post-argument filings that KCMSD's bond issue has been sold, and that the net proceeds are in the hands of the district. Presumably, these funds will produce substantial interest income before all will be expended in the renovation and construction program. The State is entitled to a determination of the extent of its liability through the 1991-92 fiscal year, and we conclude that the approximately $150,000,000 which is the State's share of capital improvements should be the limit of its contribution for capital expenditures for that period. When the second phase of the capital improvements program is to be considered, we hope that the parties will be able to agree upon a further plan. If they are not, the district court will then be in position to evaluate the success of the program that we have affirmed today and determine what further steps are necessary to remedy the constitutional violations and what further contributions from the State may be required. We observe that the present estimate of the phase two capital improvement program is in the $200 to $300 million range. Any issues regarding this program will simply have to be resolved in the future, as more information is developed.

III.

The State also argues that the capital improvements ordered by the district court violate the eleventh amendment "by requiring payment measured by past activities." In the State's view, the orders measure liability and require payments on the basis of actions taken "at a time when [the State] was under no court-imposed obligation to conform to a different standard." *Edelman v. Jordan,*

415 U.S. 651, 668 (1974). The State contends that the capital improvements orders are therefore "little different, in practical terms, from a requirement that the State pay over to the KCMSD all the funds that the district would have raised from successful [tax or bond] proposals," State's Brief at 50, or "an order to pay the KCMSD for the lost value of the deteriorated buildings." State's Brief at 26. Relying principally on *Edelman*, 415 U.S. at 668; *Papasan v. Allain*, 106 S. Ct. 2932, 2942 (1986); and *Miener v. Missouri*, 673 F.2d 969, 982 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982), the State concludes that the capital improvements orders are an award of retroactive relief, barred by the eleventh amendment.

This argument is without merit. The orders for capital improvements were made necessary in large part by the State's past actions, *e.g.*, *Jenkins*, 672 F. Supp. at 403, and the extent of relief ordered was "determined by the nature and scope of the constitutional violation[s]," *Milliken II*, 433 U.S. at 280, including the State's past violations, *e.g.*, *Jenkins*, 672 F. Supp. at 403. The orders nonetheless operate prospectively "to wipe out continuing conditions of inequality" produced by Kansas City's dual school system and are therefore valid under the eleventh amendment. *Milliken II*, 433 U.S. at 290. Specifically, the capital improvements orders require the State to participate with the school district in funding planned renovation and construction projects which the district court determined, in findings we uphold today, to be necessary to remedy the continuing effects of state-imposed segregation in Kansas City. *See id.* at 289-90; *Swann*, 402 U.S. at 15. The relief granted to the school children in the form of improved physical facilities is wholly prospective

in nature, requiring "payment of state funds * * * as a necessary consequence of compliance in the future with a substantive federal question determination * * *." *Edelman,* 415 U.S. at 668, *quoted in Milliken II,* 433 U.S. at 289. The relief is readily distinguishable from the award of retroactive payments for withheld disability benefits in *Edelman,* 415 U.S. at 663-64, the claim for restoration of a depleted trust corpus and lost income in *Papasan,* 106 S. Ct. at 2942, or the claim for compensatory educational services under the Education of the Handicapped Act, 20 U.S.C. §§ 1401-1485 (1982), in *Miener,* 673 F.2d at 982. The eleventh amendment does not bar the capital improvements ordered by the district court.

An argument essentially identical to the State's was rejected by the Supreme Court in *Milliken II,* 433 U.S. at 288-90. The State attempts to distinguish *Milliken II* by arguing that the program involved there was "narrowly tailored to the needs of particular students and necessary to the successful movement of students from minority schools to desegregated schools," whereas the programs involved here "simply make up for all the cumulative effects of past neglect." This argument is in essence a restatement of the State's position that the capital improvements ordered by the district court are not necessary to achieve desegregation—a position which we have already rejected on the basis of the district court's findings.

IV.

The State also argues that the district court erred in its allocation of costs between KCMSD and the State. In *Jenkins I,* 807 F.2d at 684-86, we determined that the district court order apportioning costs should be modified to reflect our decision in *Liddell VII* that funding be

equally divided between the State and the school district, because the order contained no findings regarding the relative responsibility of the State and KCMSD for these costs. 807 F.2d at 684, 685. The State argues that this determination of 50-50 responsibility should continue to govern.

Following our earlier decision, the district court gave further consideration to the allocation of costs, particularly with reference to magnet schools. The district court recognized that the State had created the dual school system, and that KCMSD was required to implement this system under Missouri law. It observed that both the State and KCMSD had failed to eliminate the vestiges of this system. The court reasoned that "the person who starts the fire has more responsibility for the damages caused than the person who fails to put it out." Order of July 6, 1987, slip op. at 13. The court observed that the Missouri Supreme Court had adopted the Uniform Comparative Fault Act in *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983) (en banc). Order of July 6, 1987, slip op. at 14. The district court also noted KCMSD's inability to fund more than twenty-five percent of the costs of the entire remedial plan. *Id.* at 14. The court therefore concluded that the State was responsible for seventy-five percent of the costs of desegregation, and KCMSD for twenty-five percent.[9]

Allocation of costs is part of the remedial power of the district court. *United States v. Bd. of School Com-*

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9. With respect to the capital improvement plan the district court found that because the improvements have a useful life of 30 to 50 years, the costs should be shared evenly. 672 F. Supp. at 408.

missioners, 677 F.2d 1185, 1186 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1982). Our earlier order did not foreclose the district court's further consideration of the issue, and we are satisfied that the district court did not abuse its discretion in making this allocation, nor was its factual determination as to percentages of fault clearly erroneous. We have in other desegregation cases approved varying percentages of contribution, including allocating to the state 100 percent of the costs in certain portions of the plans. *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 778 F.2d 404, 435-36 (8th Cir. 1985); *Little Rock School Dist.*, 839 F.2d at 1306-09. Other courts have similarly placed more than 50 percent of the cost on the State. *See, e.g., Bradley v. Milliken*, 540 F.2d 229, 246 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977) (seventy-five percent of the cost of purchasing school buses placed on state). The district court was aware of the serious limitations on KCMSD's capability of raising revenue. Its observation that the State has adopted a comparative fault system had substantial relevance in its determination. We affirm the allocation of costs based upon the further findings of the district court and conclude that our earlier decision en banc did not bar such determinations.

V.

The orders of the district court raising the KCMSD property tax levy and imposing a state income tax surcharge are targets of the State's appeal and an appeal filed by Jackson County, Missouri. The county's appeal is directed particularly to the temporary restraining order and preliminary injunction requiring its officials to collect the property tax levy, and the permanent injunction

entered on January 7, 1988. We have also accepted numerous amicus briefs on this issue.[10]

In addressing the funding of KCMSD's share of the remedy, the district court found "that the KCMSD is unable with its present resources to raise revenues to fund its share of the costs assessed under the desegregation orders." *Jenkins,* 672 F. Supp. at 411. The court also found that "[t]he KCMSD has exhausted all available means of raising additional revenue, including presenting a bond issue in 1987 and tax levy increase proposals to the voters in four separate elections in 1986 and 1987." *Id.* The court noted that it had encouraged the Missouri General Assembly to consider legislation affording the district more versatility to raise funds to support a desegregation program, and found that such legislation had been introduced, was received unfavorably, and ultimately failed. *Id.* The court concluded that it had explored all the alternatives set forth in *Liddell VII,* 731 F.2d at 1319-23, and that it was "left with no choice but to exercise its broad equitable powers and enter a judgment that will enable the KCMSD to raise its share of the cost of the plan * * *." *Jenkins,* 672 F. Supp. at 411.

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10. Briefs opposing the taxes were filed by the United States; a group of Kansas City area taxpayers who are paying the newly ordered taxes; the State of Kansas, whose argument was directed only to the income tax surcharge; the Washington Legal Foundation, Senator John Danforth, and two members of the Missouri House of Representatives; 56 rural Missouri school districts; the Missouri Association of Rural Educators, whose argument attacked primarily the scope of the relief ordered and the amount of state funds diverted to the district by the court's order; and the National Association of Independent Insurers, which objected only to the income tax surcharge imposed on insurance premiums received from business conducted in the KCMSD area. Briefs supporting the taxes were filed by the Lawyers Committee for Civil Rights, the NAACP, and the Civic Council of Greater Kansas City.

The district court ordered the property tax levy to be increased to $4 per $100 assessed valuation through the 1991-92 fiscal year, and authorized KCMSD to issue $150,000,000 in capital improvement bonds, to be retired within twenty years. *Id.* at 413.[11] In its October 27, 1987 order, it earmarked the proceeds of the property tax increase for retirement of capital improvements bonds, with any excess to be used to fund other desegregation costs. At the end of the 1991-92 fiscal year, only that portion of the increase necessary to maintain payments on the bonds was to remain in effect until either the bonds were retired or other provisions were adopted to insure retirement. Order of October 27, 1987, slip op. at 2.

The district court also imposed a 1.5 percent surcharge on income of residents and non-residents of KCMSD subject to the Missouri State Income Tax "for work done, services rendered and business or other activities conducted within the KCMSD." *Jenkins,* 672 F. Supp. at 412. The State Department of Revenue was required to collect the tax, and KCMSD was required to publish legal notice of the increase. Those legally responsible for withholding the state income tax are also required to withhold the surcharge. The court initially designated the revenue for use to retire capital improvement bonds, but removed this limitation in its October 27 order.

The court based its power to order tax increases and bond issuances to remedy constitutional violations on *Liddell VII,* 731 F.2d at 1322, and *Griffin v. School Bd.,* 377 U.S. 218, 233 (1964). *Jenkins,* 672 F. Supp. at 411-12.

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11. The bonds require an annual debt service for principal and interest of approximately $14.9 million per year.

The State and amici argue that the district court exceeded its judicial authority in imposing the property tax increase and income tax surcharge, invaded legislative authority in doing so, and violated the Tenth Amendment, the doctrine of separation of powers, and principles of comity. In addition, they attack this court's en banc decision in *Liddell VII*, argue that later decisions limit it, and urge distinctions between the issues presented in this case and the Supreme Court's holding in *Griffin*.

A.

We first deal with a number of general arguments offered by the State and amici, based on the constitutional foundations of judicial power. They first offer an historical argument, relying on a number of The Federalist Papers, particularly number 78, which states that "[t]he judiciary * * * has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever." The Federalist No. 78 (A. Hamilton) (H. Lodge ed. 1888). While Hamilton stressed the weakness of the judiciary, we do not believe The Federalist advocates judicial impotence. Hamilton also stated that the complementary limitations on legislative authority "can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *Id.*

For the most part the arguments of the State and amici either ignore the constitutional violations that the district court found and we have affirmed, or would render the courts powerless to redress such violations. The ju-

diciary's power to determine the rights and liabilities of parties in cases arising under the Constitution and laws of the United States is beyond question, and this power is without purpose if it does not carry with it the power to determine a remedy. *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 162-63, 166-67, 176-80 (1803).

We may also dismiss summarily the State's related arguments based on the tenth amendment and the principle of separation of powers. These doctrines simply have no bearing on the district court's options in enforcing its judgment. In *Milliken II*, 433 U.S. at 291, the Supreme Court rejected the argument that a school desegregation remedy violated the tenth amendment, stating: "The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." The Court has likewise stated that "the separation-of-powers principle * * * has no applicability to the federal judiciary's relationship to the States." *Elrod v. Burns*, 427 U.S. 347, 352 (1976) (plurality opinion by Brennan, J.).

The State's argument on principles of federal/state comity is a matter of more concern to us, but we will deal with it as we discuss the specific issues before us.

B.

This panel does not write on a clean slate with respect to the property tax issue. The court en banc has held that "the district court's broad equitable powers to remedy the evils of segregation include a narrowly defined power to order increases in local tax levies on real estate. Limitations on this power require that it be ex-

ercised only after exploration of every other fiscal alternative." *Liddell VII*, 731 F.2d at 1320.

We enumerated in *Liddell VII* three inquiries necessary in determining whether fiscal alternatives are unavailable or insufficient to finance a desegregation order: first, what amount of money is necessary to fund the order; second, whether the school board is able with its resources to fund its share of the costs; and third, whether the school board has considered alternative sources of revenue, such as the submission of a referendum or legislative authorization for the board to impose other taxes. Finally, if such alternatives fail and the board and the State as joint tortfeasors are unable to agree on an alternative method of funding, then the district court must conduct an evidentiary hearing and enter a judgment sufficient to cure the constitutional violations found. *Id.* at 1323.

The district court in this case carefully followed the requirements of *Liddell VII*. *See Jenkins*, 672 F. Supp. at 411. Voluminous materials were filed with the court before entry of the order, and the parties specifically waived their right to an evidentiary hearing on this issue. In 1986 and 1987 KCMSD submitted four levy increase and one bond referenda, all of which failed, and unsuccessfully sought legislative authorization for additional funding methods.[12] This fully satisfies *Liddell*, and we should require no more. We do not agree with the dissent's suggestion that we place the entire funding burden on the State under the principle of joint and several liability, leaving the State to its contribution remedy. This would simply prolong the controversy, rather than resolving this

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12. See footnotes 16 and 20, *infra*.

already lengthy litigation, and would, in the end, meet the same obstacle the district court faced—the fact that KCMSD's contribution can only come from additional taxes or authorization of new sources of revenue.

Liddell VII explored in detail the support for its conclusion that a district court may order a property tax increase in such circumstances, including *Griffin v. School Bd.* and *United States v. Missouri*, 515 F.2d 1365 (8th Cir.) (en banc), *cert. denied*, 423 U.S. 951 (1975). In *Griffin*, the Supreme Court held that a district court could enjoin county authorities from paying tuition grants and giving tax credits while its public schools remained closed to avoid desegregation and, "if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system * * * like that operated in other counties in Virginia." 377 U.S. at 233. In *United States v. Missouri*, three St. Louis suburban school districts were consolidated and the tax rate for the consolidated district was set at the rate of the higher of the three districts. 515 F.2d at 1371-73. There, we "also acknowledged the district court's remedial power to require a tax levy in excess of that authorized by the voters." *Liddell VII*, 731 F.2d at 1320 (citing *United States v. Missouri*, 515 F.2d at 1371-72).[13]

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13. The court in *Liddell VII* found further support for its reasoning in a number of Supreme Court decisions ordering municipalities to levy and collect taxes for satisfying their contractual obligations, and rejecting arguments that state law restrictions on the power to tax prevented them from doing so. 731 F.2d at 1322. The court also relied on numerous decisions based on state law that municipalities may not avoid their liability in tort by pleading constitutional or statutory debt limitations. *Id.*

The State and amici primarily attack *Liddell VII* by raising questions about its underpinnings, particularly by arguing that *Griffin* and *United States v. Missouri* only authorize a court to order the levy of taxes that have already been authorized by state law or to invalidate state action taken in resistance to a desegregation order.

The decision of the court en banc in *Liddell VII* is the law of this circuit, binding on this panel, and requires that we affirm the district court's order with respect to the property tax increase. *Liddell VII* analyzed decisions cited by the parties in support of their arguments that the district court lacks power to order a property tax increase, including *Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978) (en banc), *cert. denied*, 446 U.S. 923, *reh'g denied*, 447 U.S. 916 (1980), which it determined to support its ruling,[14] and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), which it distinguished. *Liddell VII*, 731 F.2d at 1321-22. Following the decision in *Liddell VII*, the State of Missouri filed a petition for certiorari raising the propriety of the holding on property taxes, and the petition was denied. *Leggett v. Liddell*, 469 U.S. 816 (1984) (No. 83-1386).

Judge Clark's order may thus be affirmed solely on the basis of *Liddell VII*.[15] It is not necessary, however,

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14. Like *Evans*, 582 F.2d at 780, *Plaquemines Parish School Bd. v. United States*, 415 F.2d 817, 833-34 (5th Cir. 1969), which is also cited by the State, recognized and upheld the power of the district court to enter an injunction requiring the State to make funds available to the school board to pay for the desegregation plan drawn by the district court.

15. The amici point to the opinions of dissenting judges in *Liddell VII*. We must first observe that the entire court, including the dissenting judges, is bound by this court's en banc

(Continued on following page)

that we do so, for even without relying on *Liddell VII*, we believe that the district court's property tax, as modified in this opinion, is within the proper limits on its remedial powers.

Among the several sources of funds available to KCMSD under Missouri law, only the tax on real and personal property located within the district is under the school board's control. Substantial limitations are placed on this tax by the state constitution and statutes. The tax levy is limited to $1.25 per $100 of assessed valuation, but a majority of voters may approve a levy of $3.75 per $100. Mo. Const. art. X, §§ 11(b), 11(c). Any increase above the rate of $3.75 requires approval by two-thirds of the voters. Mo. Const. Art. X, § 11(c). Any school construction or repair bonds must also be approved by two-thirds of the voters. Mo. Rev. Stat. § 164.151 (1986).

These requirements, particularly the two-thirds vote, have had substantial impact upon KCMSD's financial resources. On June 20, 1969, the district submitted a levy increase of $3.05 above the constitutional $1.25 limit, for a total of $4.30. This was approved by 53 percent of the voters, but failed as it lacked a two-thirds majority. Shortly thereafter, on July 1, 1969, the voters approved by a 63 percent vote a $2.50 increase to make a total levy of $3.75. This increase required only a simple majority and is the last to date approved by the necessary percentage of KCMSD voters. Some six levy increases were

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Footnote continued—

decision in *Liddell VII*. Further, the dissents did not imply that a district court should be left powerless to enforce remedial orders, as the amici propose. *See, e.g.*, 731 F.2d at 1332 (Gibson, J., concurring and dissenting).

submitted between 1970 and 1983. Four received the approval of a simple majority, but all six failed to receive the required two-thirds approval.[16]

Exhibits before the district court in *Jenkins I* reveal that between 1974 and 1982 the levy varied between $4.05 and $3.80. In *Jenkins I*, 807 F.2d at 686, we observed that the levy in KCMSD was $3.43 per $100. The district court order presently before us finds that the levy has been reduced to $2.05. *Jenkins*, 672 F. Supp. at 413. This substantial reduction of the levy is due to the operation of additional restrictions imposed by state laaw.

Missouri's Proposition C was adopted by initiative on November 2, 1982. Proposition C allocates one cent on the dollar of the state sales tax to the School District Trust Fund, Mo. Rev. Stat. §§ 144.700-.701 (1986), to be distributed in accordance with Mo. Rev. Stat. § 163.087 (1986). It reduces the total operating levy in each school district to decrease the revenue received by an amount equal to 50 percent of the previous fiscal year's sales tax receipts. Mo. Rev. Stat. § 164.013 (Supp. 1987).[17] In addition, the Hancock Amendment, also adopted by initiative, 1980 Mo. Laws 629, mandates revision of levy rates so that the same amount of tax revenue, adjusted for in-

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16. Levy increases were also submitted on February 4, 1986, August 5, 1986, November 4, 1986, and March 31, 1987, the last three containing separately submitted issues for earmarked usage such as salary increases, bond retirement, and desegregation expenses. Only one of the eight submitted issues required approval by two-thirds, but all failed of passage.

17. The statute provides exclusions for sales tax revenue attributable to pupils residing on federal lands, and an amount necessary to maintain the commissions of county officials and county funds under Mo. Rev. Stat. § 50.338 (1986). The statute also provides that if a district fails to reduce its operating levy in compliance with this section, state aid under Mo. Rev. Stat. § 163.031 (1986) will be reduced in an equivalent amount.

flation, will be produced from existing property after reassessment as was produced in the previous year. Mo. Const. art. X, §§ 16-24; Mo. Rev. Stat. § 137.073 (1986). State-wide reassessment of real estate has been required under Mo. Rev. Stat. § 137.115 (Supp. 1987), and the total assessed valuation of property in KCMSD increased from approximately $1.2 billion in 1983 to nearly $1.8 billion in 1987.

These changes in state law have imposed a unique fiscal disadvantage on KCMSD, depriving it of the benefit of increases in assessed valuation and diverting nearly one-half of the sales taxes collected in the district to other parts of the state. An exhibit before the district court demonstrated that sales tax collections within KCMSD were $31.2 million, of which only $14.6 million were allocated to KCMSD for school use. As no other funding has been forthcoming, the levy reductions mandated by the Proposition C sales tax and reassessment rollbacks have caused the dramatic reduction of KCMSD's levy to its present level of $2.05. The laws of Missouri have thus erected a complicated structure restricting KCMSD's ability to increase its levy and fund its share of the desegration remedy.

Thus, state law so narrowly circumscribes KCMSD's ability to raise money that, if forced to operate within these limits, the district court would lack power to implement a remedy. The Supreme Court has made it clear that state law limitations cannot hinder a district court from remedying constitutional violations. In *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971), Chief Justice Burger, writing for a unanimous Court, stated that "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the

operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." *See also Milliken I*, 418 U.S. at 744. "We have likewise held in ordering implementation of a school integration plan that 'the remedial power of the federal courts under the Fourteenth Amendment is not limited by state law.'" *United States v. Missouri*, 515 F.2d at 1372-73 (quoting *Haney v. County Bd. of Educ.*, 429 F.2d 364, 368 (8th Cir. 1970)).

Moreover, this general supremacy principle applies in cases concerning state tax laws as well as any other type of state laws. The Supreme Court's citation of *Griffin* to support this general principle shows that the Court does not view *Griffin* as limiting federal courts' authority to order taxes to cases where no state law would be violated. In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, *modified on other grounds sub nom. Washington v. United States*, 444 U.S. 816 (1979), a district court's decree concerning an Indian treaty required state officials to act contrary to state law limitations on their powers. The Supreme Court cited *Swann* and *Griffin* in upholding the district court's powers to order the state officials to take actions contrary to state law:

> State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution. It is also clear that [the state] parties to this litigation * * * may be ordered to prepare a set of rules that will implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so. *E.g., North Carolina*

Board of Education v. Swann, 402 U.S. 43; *Griffin v. County School Board*, 377 U.S. 218.

Id. at 695 (other citations omitted). In *Washington State*, as in this case, there was no suggestion that state law restrictions had been adopted to evade the court's remedial orders.

With these precedents, we must reject the State's arguments that the district court's power to raise property taxes under *Griffin* is limited to cases in which the taxes have been authorized under state law or the state law limitations on a school district's taxing authority are enacted to prevent implementation of a desegregation order.

KCMSD has admitted that it violated the Constitution by failing to remove the vestiges of the segregated school system. The district's only method for raising funds is the property tax. Although KCMSD's assessed property value per pupil is higher than that of any other school district in the area, *Jenkins I*, 807 F.2d at 686, its levy of $2.05 was the lowest in Jackson County. With these considerations and under the precedent of the Supreme Court in *Griffin*, *Swann*, and *Washington State*, and this court in *Liddell VII* and *United States v. Missouri*, the district court did not err or abuse its discretion in ordering that the KCMSD property tax levy be increased to allow the district to fund its share of the desegregation remedies. In doing so, it followed clear authority that restrictions and limitations of state law which impede the disestablishing of a dual school system may be set aside to remedy the constitutional violations.

The State and amici argue vigorously that the actions of the district court violate the right of the people to vote on an increase in their property taxes. Our holding

in *United States v. State of Missouri*, 515 F.2d at 1372-73, rejected that argument. We have recently addressed similar concerns in *Little Rock School Dist.*, where we stated that "[t]he right most prominently involved here is the right to a public education free of racial discrimination. That right 'may not be submitted to vote; [it] depend[s] on the outcome of no elections.'" 839 F.2d at 1303 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). In *Haney v. County Bd. of Educ.*, 410 F.2d 920 (8th Cir. 1969), we specifically rejected the argument that orders in a desegregation case were limited by state law requiring consent of the electorate, stating that "'[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.'" 410 F.2d at 926 (quoting *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736-37 (1964)).

While we affirm the actions that the court has taken to this point, as we deal with an on-going remedy we think it appropriate to consider the procedures which the district court should use in the future. It is here that the arguments of the State and amici concerning principles of federal/state comity have their proper application, as we have expressed a desire to use minimally obtrusive methods to remedy constitutional violations. *See Liddell VII*, 731 F.2d at 1319-23; *United States v. Missouri*, 515 F.2d at 1372-73. State law currently requires the KCMSD board to submit its proposed levy to the collection authorities of Jackson County. Mo. Rev. Stat. § 164.011.2 (Supp. 1987). Deference should be given to the views of concerned state and local officials and to the working of local tax collection procedures to the extent that they appear compatible with the goals to be

achieved. *United States v. Missouri,* 515 F.2d at 1373. We believe a preferable method for future funding of KCMSD's obligation under the district court's desegregation orders is to authorize the school board to submit a proposed levy to the collection authorities adequate to fund its budget, including its share of the cost of the desegregation programs ordered by the district court. County and state authorities should then be enjoined from applying those Missouri constitutional and statutory limitations that would limit or reduce the levy below the amount submitted by the school board.

However, the levy must be subject to some reasonable limitation, taking into consideration rates in neighboring areas. *See United States v. Missouri,* 515 F.2d at 1372-73. There are several possible approaches for such a limitation. One would be to allow the highest levy approved by any district in Jackson County, which in this case is Lee's Summit with a levy of $4.77. Another approach would be to allow a combination of the highest levies for operating expenses and bonded indebtedness ever approved by KCMSD voters. A third approach would be to allow the average of the highest two or three levies in Jackson County. The levy must, of course, be sufficient to fund the necessary desegregation programs, and we believe that it is best to leave the selection of an appropriate limitation to the district court's discretion.[18]

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18. We recognize that there may be some circumstances in which the district court could justifiably find that KCMSD did not have sufficient resources to fully fund the apportionment we have affirmed today of the desegregative costs, and if it so finds, we do not preclude the district court from placing the remainder of the burden on the State. *See* Part V, Section D, *supra,* and footnote 21. It is our intent that KCMSD contribute its share, subject to these considerations.

Permitting the school board to determine the amount of its levy (subject to reasonable limits) will give maximum consideration to the views of state and local officials and is least disruptive of existing state laws and procedures. The KCMSD board and county and state officials will be allowed to perform their functions as required by state law. In addition, the district court will be removed from the process of setting the levy, and limited solely to establishing the maximum limit and enjoining enforcement of those provisions of Missouri law that prevent KCMSD from raising the money to remedy the constitutional violations. Obviously, the parties can bring before the district court any objections or problems that may arise in implementing this plan.

Finally, we observe that the district court's October 27, 1987 order provided that the property tax increase would be reduced at the end of the 1991-92 fiscal year to generate only the amount necessary to retire the capital improvement bonds, approximately $14.9 million per year. In view of our reversal of the income tax surcharge (and unless new revenue sources are authorized), the increased property tax will be the only revenue source available to fund the desegregation expenses ordered by the district court. Accordingly, the ordered reduction of the property tax cannot be automatically implemented at the end of the 1991-92 fiscal year, and the district court must then evaluate further funding requirements.

One issue remains for determination, and that is Jackson County's appeal from the district court's January 7, 1988 order entering a permanent injunction against county officials to collect the property tax. On Octo-

ber 17, 1987, the district court entered a preliminary injunction against the county, holding that it was necessary to carry out the purpose of its lawful authority, and citing *Cooper v. Aaron,* 358 U.S. 1 (1958), and *Faubus v. United States,* 254 F.2d 797 (8th Cir.), *cert. denied,* 358 U.S. 829 (1958). The court also rejected the county's claim that the Tax Injunction Act, 28 U.S.C. § 1341 (1982), prevented it from entering such an order.

This court has already rejected the county's anti-injunction act argument in denying its petition for a writ of prohibition. *In re Jackson County,* 834 F.2d 150 (8th Cir. 1987). The county's argument that it has no connection with the underlying controversy because it is not a party and therefore should not be subject to the injunction is without merit. County officials are entrusted by law with the collection of taxes levied by local school districts. Here the district court entered an order that such taxes be increased and the county refused to adjust the 1987 school tax levy accordingly. The Supreme Court has made clear that "nonparties that interfere with the implementation of court orders establishing public rights may be enjoined." *Washington State,* 443 U.S. at 692 n.32. The county's arguments are utterly lacking in merit and the district court's order enjoining county officials to collect the property tax is affirmed.

C.

The income tax surcharge ordered by the district court involves substantially different considerations. As we have seen, the property tax is the established source of revenue for Missouri school districts, and the basic effect of the district court's order was to set aside levy limitations on this taxing authority. The order with

respect to the income tax surcharge is an entirely different matter. The district court defined the precise scope of the surcharge, its effective date, and set forth procedures for its collection by the State and delivery to KCMSD. *See Jenkins*, 672 F. Supp. at 412. We are satisfied that the district court invaded the province of the legislature in ordering this surcharge, and that the order is beyond the power of the district court as outlined in *Swann*, 402 U.S. at 45; *Griffin*, 377 U.S. at 233; *Liddell VII*, 731 F.2d at 1319-23; and *United States v. Missouri*, 515 F.2d at 1371-73.

Those decisions authorize the district court to set aside restrictions or limitations imposed by state law that impede the disestablishment of a dual school system, with appropriate deference to local tax collection procedures and the views of concerned state and local officials. The income tax surcharge fails on both counts. Rather than merely removing the levy limitation on an existing state or local taxing authority, the income tax surcharge restructures the State's scheme of school financing and creates an entirely new form of taxing authority. We believe the district court has exceeded its authority in ordering the collection of school district revenue from an entirely new source, with all funds delivered to one district for a specified purpose.[19] While this income tax surcharge was part of the legislative program KCMSD developed and submitted to the State General Assembly,[20]

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19. Heretofore the State of Missouri has seen fit to place no limitations on its income tax revenue; it is payable into the general treasury of the State.

20. Legislation was introduced in the 1987 session of the House of Representatives, H.B. 757, to give school districts the authority to impose a sales tax up to 1/2 cent on individual

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none of the parties to this litigation seriously urged the district court to adopt it as part of a judicial remedy.

We accordingly reverse that part of the district court's order imposing the income tax surcharge. Any unexpended collections must be refunded and the district court is directed to take such action as it deems appropriate with respect to any further refunds. We caution that the constitutional violations must be remedied and the remedies fully funded. Any refund orders must be crafted recognizing this fundamental principle.

D.

In our earlier en banc opinion we made clear that the remedy ordered by the district court must be fully funded. *Jenkins I*, 807 F.2d at 686. Should the funds that KCMSD can provide for desegregation expenses under today's decision fall short, the remainder must be paid by the State, as the orders of the district court have imposed joint and several liability on the State and KCMSD.[21] *See* notes 3 & 4, *supra*. *See also Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 & n.8 (1979); *Watts v. Laurent*, 774 F.2d 168, 179 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986).

Footnote continued—

earnings and business profits tax on residents and non-residents earning income or profits within the district and/or a surcharge of up to 25 percent on residents' state income tax, increasing the present tax rate from 6 percent to 7.5 percent. Further, any such tax increases could be approved by a simple majority. The KCMSD board proposed and supported this legislation. The legislation failed.

21. While we have rejected the argument urged by a number of the amici and adopted by the dissent that under this principle all costs should be borne by the State, the State does have an obligation to pay any required sums which are beyond the capacity of the school district.

The funding provisions that we have affirmed today will continue until further order by the district court, or until KCMSD is able to fund its share of the desegregation remedy or the legislature has made other sources of revenue available for this purpose.

VI.

The Jenkins class and KCMSD appeal from the district court's denial of the class' motion to have Kansas students included as participants in the KCMSD magnet plan. The district court declined to order KCMSD to educate residents of another state, with the State of Missouri paying the costs. The court found that inclusion of Kansas students would be unduly complex. We find no abuse of the district court's discretion in declining to order Missouri to pay to educate residents of another state. As the district court noted, this ruling does not preclude Kansas school districts from participating in a voluntary interdistrict transfer agreement with KCMSD.

VII.

Jackson County, Missouri and Icelean Clark, *et al.*, a group of individual and corporate taxpayers, appeal the district court's October 27, 1987 order denying their applications to intervene as of right.[22] The county filed a renewed motion to intervene on October 7, 1987 and the Clark group moved to intervene on September 25, 1987 to challenge the funding orders of the district court. The district court denied the motions as untimely.

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22. The district court also denied the applications of the county and the Clark group for permissive intervention, but these rulings have not been appealed.

Rulings on the timeliness of applications to intervene are committed to the sound discretion of the district court and will not be disturbed on review absent an abuse of that discretion. *NAACP v. New York*, 413 U.S. 345, 365-66 (1973); *Arkansas Elec. Energy v. Middle South Energy, Inc.*, 772 F.2d 401, 403 (8th Cir. 1985). Timeliness is determined from all the circumstances, *NAACP v. New York*, 413 U.S. at 366, but three factors receive particular attention: "'how far the proceedings have gone when the movant seeks to intervene, prejudice which resultant delay might cause to other parties, and the reason for the delay,'" *Arkansas Elec. Energy*, 772 F.2d at 403 (quoting *Nevilles v. EEOC*, 511 F.2d 303, 305 (8th Cir. 1975) (per curiam) (citations omitted)).

Applying the analytical framework set forth in *Nevilles*, the district court ruled that the Clark group's September 25, 1987 motion and the county's October 7, 1987 motion were untimely because the court had already determined how KCMSD's portion of the desegregation plan would be funded in its September 15, 1987 order; the appellants had ample opportunity to file timely applications; and intervention at this late stage of the proceedings would unduly delay implementation of the remedy to which the members of the Jenkins class are entitled. Having carefully reviewed the record, we are satisfied that the district court did not err in so ruling.

The Clark group argues that their delay in seeking intervention should be excused because they did not have "actual or constructive notice of the District Court's ultimate taxation scheme" before entry of the September 15, 1987 order, and that dismissal of their motion to intervene in such circumstances constitutes a denial of due

process. While "absence of knowledge may, under certain circumstances, excuse delay in attempting to intervene," the burden of demonstrating lack of knowledge rests with the persons seeking intervention. *EEOC v. Westinghouse Elec. Corp.*, 675 F.2d 164, 165 (8th Cir. 1982) (per curiam); *Nevilles*, 511 F.2d at 305. The taxpayers have not met this burden. In its June 14, 1985 order, the district court discussed its power to raise taxes to fund the desegregation remedy and enjoined Missouri's "Proposition C" tax levy rollback. *Jenkins*, 639 F. Supp. at 44-45. The court again enjoined the rollback on August 25, 1985, and in its July 6, 1987 order the district court made clear its intention to fund KCMSD's portion of the remedy through either an earnings tax or state income tax surcharge. These orders were regularly reported by the local news media. Taken together, the orders were more than sufficient to inform the taxpayers of the status of the suit and put them on notice that their interests would be affected by the district court's funding orders. In particular, local property owners in the Clark group had already been affected by the orders enjoining the tax levy rollback. On this basis, the district court did not abuse its discretion in concluding that the taxpayers' motion to intervene was untimely. *Cf. NAACP v. New York*, 413 U.S. at 366-67; *EEOC v. Westinghouse*, 675 F.2d at 166; *Nevilles*, 511 F.2d at 306. As the taxpayers had fair notice of the action and were allowed to participate as amici curiae by the district court, their due process argument is also without merit.

Jackson County argues that its motion was timely because it originally sougth to intervene in an application filed on April 15, 1985, which "made the district court aware of its interest in any order dealing with tax in-

creases" well before the September 15, 1987 funding order. While the county's April 15, 1985 motion was filed with the district court, there is no proof that the motion was served on the parties, as Fed. R. Civ. P. 24(c) requires. The certificate of service accompanying the motion is not signed and none of the parties filed responses to the motion or otherwise indicated that they had received it. Thereafter, for a period of nearly two and one-half years, the county failed to take any action to intervene until the filing of its October 7, 1987 motion. During this period, as we have said, the district court issued a series of highly publicized orders which gave the county, like the taxpayers, ample notice of the course of the action and the fact that the county's interest as local property tax collector would be affected by the district court's funding orders. The county's two and one-half year delay in pursuing its motion to intervene was sufficient to justify the district court in treating the motion as having been filed on October 7, 1987 and ruling it untimely on that basis. *See McCarthy v. Kleindienst*, 741 F.2d 1406, 1415-16 (D.C. Cir. 1984).

The district court did not err in denying the motions of the Clark group and Jackson County to intervene.[23]

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23. We are also satisfied that if the district court erred in denying intervention, the error was harmless. The district court granted members of the Clark group permission to participate as *amici*, and they have filed an *amicus* brief with this court challenging the funding orders and have participated in oral argument. The taxpayers have thus been granted the opportunity to challenge the funding orders, *see Arkansas Elec. Energy*, 772 F.2d at 404, and their challenge is based on questions of law which they can adequately present as *amici*, *see Blake v. Pallen*, 554 F.2d 947, 955 (9th Cir. 1977). The county has simply failed to overcome the presumption that its interests are adequately represented by the State. *See, e.g., Environmental Defense Fund v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979) (per curiam).

VIII.

We affirm the judgment of the district court with respect to the scope of the remedy. We also affirm its orders with respect to the property tax, but remand for further modifications as provided in this opinion. We reverse the judgment of the district court with respect to the income tax surcharge and stay any further collection. Finally, we affirm the order of the district court denying the motions of the Clark group and Jackson County to intervene.

LAY, Chief Judge, concurring and dissenting.

I generally concur in the opinion of the court. I take one major exception to the opinion. The district court found that the liability of the parties should be apportioned seventy-five percent for the state and twenty-five percent for the school district, but specifically held that liability was based upon a finding of joint and several tortfeasors.

The state appealed the apportionment of liability to this court. However, it has never appealed the district court's original judgment of joint and several liability. I do not fault counsel because it would be difficult absent a divisible injury under traditional legal principles to dispute the validity of such a holding.

This court's opinion has appropriately discussed how the state has "so narrowly circumscribe[d] KCMSD's duty to raise money" and that as a partial result therefrom it is a practical reality that the school district cannot fully contribute to the funding of the remedial program to meet constitutional compliance. Under the circumstances traditional legal principles apply. I would simply hold

that under a judgment of joint and several liability that upon failure of one tortfeasor to compy with the judgment because of financial inability to fund the remedial plan that any other tortfeasor may be liable for the whole. As the Supreme Court indicated in *Edmonds,* cited in the court's opinion, quoting from the Second Restatement of Torts:

> A tortfeasor is not relieved of liability for the entire harm he caused just because another's negligence was also a factor in effecting the injury. "Nor are the damages against him diminished." Restatement, [Second] *supra,* § 879, Comment a. Likewise, under traditional tort law, a plaintiff obtaining a judgment against more than one concurrent tortfeasor may satisfy it against any one of them. *Id.,* § 886. A concurrent tortfeasor generally may seek contribution from another, *id.,* § 886A, but he is not relieved from liability for the entire damages even when the nondefendant tortfeasor is immune from liability. *Id.,* § 880. These principles, of course, are inapplicable where the injury is divisible and the causation of each part can be separately assigned to each tortfeasor. *Id.,* §§ 433A (1) and 881.

Edmonds, 443 U.S. at 260-61 n.8.

I do not doubt the constitutional authority of the district court as approved in *Liddell VII* to exercise the remedial order necessary to bring about constitutional compliance. However, a judicial decree requiring increase in local levies on real estate and the imposition of a property tax should "be exercised only after exploration of every other fiscal alternative." *Liddell VII,* 731 F.2d at 1320. Thus, I do not feel that it was necessary

for the district court or feasible for this court to approve a property tax levy by KCMSD to meet its fiscal responsibility. Where other alternatives remain, it is the very essence of judicial restraint not to go beyond the relief necessary. The State of Missouri should therefore pay for any amount KCMSD is unable to contribute, failing existing means by KCMSD to raise the monies in order to effectuate constitutional compliance. The state may under existing law seek contributions from the KCMSD but this problem is between the parties and not for the court. I therefore would set aside the property tax levy ordered by the district court and use existing legal principles to effect constitutional compliance by holding the state liable for any deficiency KCMSD cannot contribute under the plan.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(Amended October 24, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1934/2537
87-1479/2299/2300/2565/2588/2589
88-1073-WM

Kalima Jenkins, etc., et al.,
Appellees,

v.

The State of Missouri, et al.,
Appellants.

Appeals from the United States District Court
for the Western District of Missouri.

There are now three petitions for rehearing en banc pending before the Court. It is hereby ordered that all petitions for rehearing en banc are denied.

Judge Pasco M. Bowman and Judge Roger L. Wollman would have granted the petitions. Judge Frank J. Magill did not participate.

The Court's mandate shall issue forthwith.

BOWMAN, Circuit Judge, joined by WOLLMAN, Circuit Judge, dissenting from the denial of rehearing en banc.

This is a case of exceptional importance. The remedies ordered go far beyond anything previously seen in a school desegregation case. The sheer immensity of the programs encompassed by the district court's order—the

large number of magnet schools and the quantity of capital renovations and new construction—are concededly without parallel in any other school district in the country. Similarly, in no other case has federal judicial power been used to impose a tax increase in order to provide funding for a desegregation remedy.

In addition, the case presents the overarching question of whether these court-ordered programs and court-ordered taxes are Constitutionally required in order to rectify the vestigial effects of legally mandated segregation (dead now for over thirty years) or instead represent an unsupportable exercise of judicial power in a legislative-style attempt to solve social problems that have their origins in other causes.

In over five years on the bench, I have not seen a case more deserving than this one of thoughtful consideration by the entire Court. The decision as it stands appears to arrogate to the federal judiciary vast powers that under the Tenth Amendment are reserved to the states or to the people. I therefore regret that a majority of the Court has voted to deny the petitions for rehearing en banc.

A True Copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(Filed September 15, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

On August 3-6, and 10-12, 1987, this Court conducted a hearing on KCMSD's motion for approval of its long-range capital improvement plan. After careful consideration, the Court approves the plan as modified in this order and orders funding of those projects scheduled for completion by the fall of 1990. The KCMSD also submitted for the Court's approval a student transportation plan for the long-range magnet school plan in 1987-88. The State objects to the plan and suggests that a hearing on the plan may be required. The Court will defer ruling on the motion at this time and will give the parties an opportunity to confer in an attempt to reach an agreement on a plan and if necessary to engage in discovery. If a hearing is necessary, it is hereby set to commence on December 14, 1987 at 9:00 a.m. In addition, KCMSD had

also moved the Court for funding of its projected operating and desegregation budget deficits through 1987-88. The Court will deny the specific relief requested by the KCMSD but will provide KCMSD with additional resources to fund the share of its known and projected costs of the desegregation plan through 1992. Finally, AFT 691's motion for alternate funding relief regarding KCMSD teacher salaries will be denied as a specific part of this remedial order as the Court is of the opinion that any salary increases should be left to the discretion of the school board.

Before addressing KCMSD's request for the Court's approval of its long-range capital improvement plan, a brief review of the capital improvements previously ordered by the Court is in order. In its original remedy order of June 14, 1985, the Court approved $37,000,000 to be applied toward the most critical capital improvement needs of the KCMSD and reserved judgment as to whether additional capital improvements would be needed. *Jenkins v. State of Missouri,* 639 F.Supp. 19, 41 (W.D. Mo. 1985). On June 16, 1986, the Court authorized an additional $12,877,330 in capital improvement expenditures for the six schools that became magnets in 1986-87 under the desegregation plan. *Jenkins,* 639 F.Supp. at 53. At that time the Court also ordered the KCMSD to submit a long-range capital improvement plan by January 5, 1987. *Id.*

Next, the Court approved $52,858,301 for capital improvements to eleven KCMSD schools that are to become magnets in the fall of 1987 under the court-ordered long-range magnet school plan. Order of November 12, 1986 at p. 5. Most recently, the Court approved $7,376,135 for the purchase and renovation of the Jewish Community

Center for use as a temporary performing arts middle school magnet in 1987-88. Order of April 29, 1987 at p. 3.

Turning to the matter presently before the Court, the KCMSD has submitted a $265,000,000 long-range capital improvement plan calling for the renovation and construction of approximately 72 schools and six other facilities through the fall of 1996. The Desegregation Monitoring Committee unanimously approved the plan on February 2, 1987. The plaintiffs and AFT 691 are generally in favor of KCMSD's plan. On the contrary, the State strongly opposes the plan and his submitted an alternate proposal calling for approximately $61,000,000 in renovations to existing KCMSD schools.

The present conditions of the KCMSD schools have been improved by the $37,000,000 in capital improvements undertaken pursuant to the Court's order of June 14, 1985 (testimony of Dr. R. Hunter, KCMSD Exh. 7). This work has primarily been on the exteriors of the school buildings and the surrounding playgrounds which has resulted in making them weatherproof and thus preventing further deterioration. The improved exterior appearance of these schools serves as an increased incentive for parents to enroll their children in the KCMSD. However, the overall condition of the KCMSD school buildings, particularly the interiors, is generally depressing and thus adversely affects the learning environment and continues to discourage parents who might otherwise enroll their children in the KCMSD (testimony of Dr. Hunter, C. Eppes, D. Osbourn, KCMSD Exh. 6).

The KCMSD facilities still have numerous health and safety hazards, educational environment hazards, functional impairments, and appearance impairments (testi-

mony of Dr. Hunter, KCMSD Exh. 6). The specific problems include: inadequate lighting; peeling paint and crumbling plaster on ceilings, walls and corridors; loose tiles, torn floor coverings; odors resulting from unventilated restrooms with rotted, corroded toilet fixtures; noisy classrooms due to lack of adequate accoustical treatment; lack of off street parking and bus loading for parents, teachers and students; lack of appropriate space for many cafeterias, libraries, and classrooms; faulty and antiquated heating and electrical systems; damaged and inoperable lockers; and inadequate fire safety systems (testimony of Dr. Hunter, C. Eppes, D. Osbourn, C. DesMoineaux, KCMSD Exh. 6). The conditions at Paseo High School are such that even the principal stated that he would not send his own child to that facility (testimony of R. Meadows).

Unquestionably, the deterioration of the KCMSD facilities is due to deferred maintenance by the KCMSD. However, as the Court found in its order of November 12, 1986, the State of Missouri by its constitutional violations and subsequent failure to affirmatively act to remove the vestiges of the dual school system certainly contributed to an atmosphere which prevented the KCMSD from raising the funds to maintain its schools. Order at p. 4. Furthermore, the Court has the responsibility of providing the victims of unlawful segregation with the educational facilities that they have been unconstitutionally denied. Therefore, a long-range capital improvement plan aimed at eliminating the substandard conditions present in KCMSD schools is properly a desegregation expense and is crucial to the overall success of the desegregation plan.

STATE'S CAPITAL IMPROVEMENT PROPOSAL

The State of Missouri has submitted a capital improvement plan to remedy what it perceives as the substandard conditions present in the KCMSD (State Exh. 8). The scope of the work contained in the State's plan is estimated to cost $61,074,565, approximately $200,000,000 less than the estimated cost of KCMSD's long-range capital improvement plan. For the following reasons, the Court finds that the State's proposal is unsatisfactory because it fails to remedy the substandard conditions in the KCMSD schools.

First, the State failed to consider the criteria of suburban comparability in evaluating the capital improvements to be made to the KCMSD schools. The Court in its order of June 14, 1985 specifically stated that capital improvements needed to bring KCMSD's facilities to a point comparable with the facilities in the neighboring suburban districts should be reviewed. Notwithstanding, Dr. Robert Bartman, Acting Commissioner of Education for the State of Missouri, instructed its architect, David Pearce, to only estimate the capital improvements necessary to eliminate health and safety hazards and to provide a good learning environment. Mr. Pearce testified that he compiled his estimates before he visted any suburban schools.

Specifically, the State's proposal does include funds for work needed on the electrical, mechanical, and ventilating systems to meet code requirements. However, the State's proposal does not provide sufficient funds for the updating of those systems to insure that the equipment does not suffer frequent breakdowns (testimony of D. Osbourn, C. DesMoineaux). In addition, the State pro-

poses to paint only those specific areas on walls and ceilings which are repaired (testimony of D. Pearce). With regard to floor coverings, the State proposes to replace only those tiles which are loose or damaged with a new tile of similar color and style. Likewise, only the sections of carpeting which are worn or torn would be replaced under the State's plan. This "patch and repair" approach proposed by the State would not achieve suburban comparability or the visual attractiveness sought by the Court as it would result in floor coverings with unsightly sections of mismatched carpeting and tile, and individual walls possessing different shades of paint.

The Court also questions whether the State has budgeted sufficient funds to perform the limited scope of work that it proposes. For example, the State budgeted only $5,000 for plastering at Paseo High School, unquestionably one of KCMSD's facilities most in need of renovation or reconstruction (testimony of Dr. Hunter, D. Pearce, D. Osbourn). KCMSD has budgeted approximately $211,000 for plastering and $230,000 for interior painting at the same institution.

Other deficiencies in the State's proposal are a lack of funds for accoustical treatment in classrooms, or for floor covering on the bare concrete floors found in many restrooms. Such covering would eliminate one of the primary causes of the stench in these toilet areas (testimony of D. Osbourn). Furthermore, the State's proposal only provides handicap access to one level of each KCMSD school, thereby restricting handicapped students' access to many of the facilities and special programs offered by the KCMSD (testimony of C. Eppes). The State does not provide any funds for locker repair despite testimony by its own architect that many of the lockers are damaged,

rusted, and missing doors. The State's plan does not include funding to reconfigure spaces within the KCMSD schools to provide adequate classrooms, library, cafeteria, and administrative areas.

The Court also notes that the State failed to estimate the cost necessary to provide magnet facilities needed to implement the long-range magnet school plan approved by the Court on November 12, 1986. The State argues that the broad contours of the magnet relief ordered are uncertain at best and suggests that the Court "reserve judgment on magnet related projects to a time when the scope of the magnet relief is more certain." State's Alternative Proposals Concerning Remaining Capital Improvements Funding for KCMSD, 6/3/87 pp. 29-30. The Court is certainly not surprised by the State's "wait and see" position but finds that such an approach would seriously damage the prospects of true desegregation in the KCMSD. The magnet plan is working as evidenced by the large number of applications for the magnet programs from students new to the KCMSD, and this Court is committed to its full implementation and will order the construction of the magnet facilities as part of the long-range capital improvement plan.

In conclusion, if the KCMSD schools underwent the limited renovation proposed by the State, the schools would continue to be unattractive and substandard, and would certainly serve as a deterrent to parents considering enrolling their children in KCMSD schools. Therefore, the Court rejects the State's plan and will next consider the long-range plan submitted by the KCMSD.

KCMSD'S LONG-RANGE CAPITAL IMPROVEMENT PLAN

The KCMSD has submitted for the Court's approval a long-range capital improvement plan which calls for the renovation of approximately 55 schools, the closure of 18 facilities, and the construction of 17 new schools by the fall of 1996. However, the KCMSD is presently seeking funding for only that portion of the plan which is scheduled for completion by the fall of 1990. KCMSD estimates the cost of these renovations and new facilities at $194,328,578.

The KCMSD employed three architectural firms to review all its school facilities and determine what work was necessary to renovate the buildings. These architects applied the criteria set forth by the Court in estimating the scope of the work required to remedy the deteriorating conditions that exist in the KCMSD as a result of unlawful segregation. The result of their evaluations are contained in the 1985 capital improvement study (KCMSD Exh. 23). These architects have amended these estimates to reflect work which has been completed, or will be completed pursuant to previous court orders and to reflect inflation (KCMSD Exh. 13, 14, 15 and 18). These renovations will eliminate the existing health and safety hazards identified by the Court and will correct the conditions which impede the level of comfort needed for the creation of a good learning environment. Equally important, these renovations proposed by the KCMSD, unlike those contained in the State's plan, will make the KCMSD visually attractive and reasonably comparable to the suburban Kansas City, Missouri schools (testimony of Dr. Hunter, D. Osbourn, C. Eppes). The remedy pro-

posed by the KCMSD is not a "patch and repair" approach, but rather a comprehensive plan to restore KCMSD school facilities to an environment in which children can learn. The Court finds that the capital improvements proposed by the KCMSD to eliminate health and safety hazards and to improve the visual attractiveness and comfort level of the KCMSD schools are necessary and that their costs are reasonable.

The remaining portions of KCMSD's long-range capital improvement plan primarily consist of the expansion of existing facilities and the construction of new facilities. Before addressing these specific proposals, the Court must first review the enrollment projections on which KCMSD's long-range capital improvement plan is based.

The Court acknowledges that it is very difficult to predict what the enrollment will be in the KCMSD over the next ten years. Student enrollment in the KCMSD declined from 70,756 students in 1970-71 to 39,078 students in 1980-81 (KCMSD Exh. 19). Enrollment has continued to decline since 1980-81 but at a lesser rate with signs of a leveling off. If approved, the KCMSD long-range capital improvement plan will produce capacity for 44,890 by 1995, with a capacity of 22,183 in the elementary schools, 10,499 in the middle schools, and 12,210 in the high schools (testimony of Dr. Hunter, KCMSD Exhs. 13, 14 and 15). This plan provides capacity for an enrollment greater than the enrollments projected by the State of Missouri and the KCMSD using the cohort survival method which is based on the presumption that past enrollment trends will continue (State Exh. 19, KCMSD Exh. 24 at Tab A, Appendix 1, Table 26). However, the Court finds that the long-range capital improvement

plan should not be based upon this presumption because it is very likely that enrollment in the KCMSD will increase due to the court-ordered upgrading of the regular school curriculum, the implementation of the long-range magnet school plan, and the improvements in capital facilities which have been completed and which will be made as a result of this order.

Because of the inadequacy of the cohort survival enrollment projection, Dr. Hunter, the educational expert who developed the long-range capital improvement plan, requested the Mid-America Regional Council to estimate the future enrollment of the KCMSD using a "capture rate" analysis. The capture rate is simply the percentage of students who live in the KCMSD who actually attend KCMSD schools. The study concluded that if the capture rate attained by the KCMSD in 1970 were reachieved in 1995, the student population would total 47,898 (testimony of Dr. Hunter, KCMSD Exh. 24 at Tab A, KCMSD Exh. 19). The Court finds that this estimate is more accurate than that calculated using the cohort survival method and yet KCMSD's plan is conservative because it does not provide for all the capacity necessary to accommodate a 1995 enrollment based on the 1970 capture rate. Therefore, the Court finds that KCMSD's long-range capital improvement plan is based upon appropriate enrollment projections and will now address the expansions and new construction proposed in the plan.

KCMSD's proposal provides funds for the expansion of certain classrooms, learning resource centers, cafeterias, art and music rooms, and administrative areas. Dr. Hunter testified that these facilities were deficient in size

and prepared specifications for standard facilities needed to house adequate educational programs (KCMSD Exhs. 2, 3 and 4). His recommendations are comparable to those made by the Missouri State Department of Elementary and Secondary Education (KCMSD Exh. 11). Furthermore, Dr. Hunter's recommendations were made only after he had visited each of the KCMSD schools and eleven of the suburban schools (testimony of Dr. Hunter). The Court finds that the expansion of these facilities is necessary to provide a good learning environment and that the costs of such expenditures are reasonable.

KCMSD's proposal also includes funding for the construction of specialized facilities needed for implementation of the long-range magnet school plan approved by the Court. Phale Hale, a magnet school expert who co-authored the long-range magnet school plan approved by the Court, devedoped the facilities requirements for the long-range magnet school plan (KCMSD Exh. 5). These improvements are in addition to the approximately $53,000,000 in capital improvements approved by the Court for the schools scheduled to become magnets in 1987. The magnet school plan is crucial to the success of the Court's total desegregation plan and the KCMSD cannot effectively implement the magnet programs without special facilities. The question before the Court is whether the improvements proposed are necessary to carry out the magnet programs approved by the Court.

One example is the Kansas City Technical Center, a four year vocational and technical magnet high school which is designed to prepare students upon graduation to either enter college, obtain entry level employment, or both. This magnet will offer programs ranging from

heating and air conditioning to cosmetology to robotics. Consequently, these programs require special equipment and spacious work areas in which to instruct the students. The estimated cost for Kansas City Tech is $13,278,603, which also includes funds for an expanded cafeteria, athletic facilities, and other facilities essential for the operation of a regular high school. The Court finds that all of the facilities proposed for the Kansas City Technical Center and all the special facilities requested for the other magnet programs are necessary to implement the long-range plan and that the estimated costs of these additional facilities are reasonable.

The long-range capital improvement plan also calls for the closure of eighteen KCMSD school facilities, 15 of which are currently operating as schools, and the construction of seventeen new schools, the last of which is a new middle school III scheduled for completion by the fall of 1993. The criteria used by the KCMSD to determine whether to renovate a school or build a new facility was that buildings with renovation costs of $45 per square foot or more should be replaced (testimony of Dr. Hunter). The estimated cost of construction of the new schools ranges from $61.80 per square foot for middle schools I and III to $95.70 per square foot for the new Attucks Elementary School. Both the architects for the KCMSD and the State of Missouri stated that buildings with renovations costs of more than 50% of the cost of new construction are candidates for replacement (estimony of D. Osbourn, D. Pearce).

The most expensive of the proposed new constructions is Paseo High School at an estimated cost of $13,991,375, excluding architectural fees and inflation (KCMSD Exh. 15). The renovation of the existing fa-

cility which includes the addition of special magnet facilities would cost an estimated $8,033,100 (KCMSD Exh. 15). The Court finds that it would be imprudent to renovate Paseo High School rather than build a new facility because both the architects for the KCMSD and the State stated that Paseo High School is near the end of its useful life (testimony of D. Osbourn, D. Pearce). In addition, it is essential to the success of the magnet school plan that Paseo High School be one of the most attractive magnet programs because it is located in an area which is considered difficult to desegrate (testimony of Dr. Hunter). Therefore, the Court approves the construction of a new Paseo High School and the sixteen other new facilities proposed in the long-range capital improvement plan. However, the Court approves funding of only those facilities scheduled for completion by the fall of 1990, and reserves final judgment on the remaining schools until a time when more current enrollment figures are available.

The Court also approves the closure of Attucks, Faxon, Gladstone, Greenwood, Holmes, Knots, Kumpf, Manchester, Pershing, Pitcher, Switser, Thatcher, Willard, Woodland, Linwood West, and Norman Elementary Schools. The Court will not establish closing dates at this time so that these schools may be used to house students while other facilities are being renovated or constructed under the long-range capital improvement plan.

KCMSD's plan also requests funding for the renovation of East Stadium, Southeast High Stadium and Arena, the Norman Administrative Center, Linwood, and Linwood West. The Court finds that these additional facilities are in need of renovation but finds that the 8% amount allotted for architectural and engineering fees, which is included in the total most of their renovation, is

excessive. The State's expert David Pearce testified that 6% is a customary architectural fee in school capital improvement projects. Therefore, the Court approves these renovations but in a lesser amount to reflect architectural fees of 6%. Similarly, the Court will only approve a 6% architectural fee for all the other renovations and new constructions approved by the Court as part of the long-range capital improvement plan.

In addition, the KCMSD did not present any evidence regarding its request for a furniture budget for schools to be renovated under the plan and for schools previously renovated. The Court simply cannot consider such requests without knowing the quantity and quality of the furniture that is presently available in the KCMSD.

The KCMSD has adjusted the estimated costs of its long-range capital improvement plan by 5% a year to reflect inflation. The Court finds that this percentage is reasonable and will apply it to the estimated costs of the plan as modified by this Court.

Finally, the KCMSD has also requested funding for a project management team which would oversee the implementation of the long-range capital improvement plan. The team, a joint venture of J.E. Dunn Construction Company and the Allied Companies, would utilize the architects, engineers and other specialists from these four firms in acting as KCMSD's agent in supervising the architects and contractors who are hired to perform the renovations and new construction set forth in the plan. In addition, the project management team will provide other professional services including project scheduling, cost control, quality control, and site selection (testimony of Robert Barrett, KCMSD Exh. 22). The KCMSD has

negotiated a contract, pending this Court's approval, with this project management team which provides that the team will receive compensation of $12,750,000 or 4% of the total capital improvements program expenditures for phases IV through VIII of the capital improvements program, whichever is less (KCMSD Exh. 22).

The Court finds that it is not feasible for the KCMSD to manage internally a program of the magnitude of the proposed long-range capital improvement plan. It is essential that the renovations and construction are completed on schedule and at costs within the budget approved by the Court. The Court finds that the project management team is necessary to effectively implement the plan and the Court is confident that the team will effect cost savings considerably more than the cost of the project management team. Accordingly, the Court approves the contract entered into between the KCMSD and the project management team (KCMSD Exh. 22) but approves the budget for the supervision and planning for only the first three years of the long-range capital improvement plan.

For the reasons set forth, the Court approves KCMSD's long-range capital improvement plan as modified in this order and orders the funding of those projects scheduled for completion by the fall of 1990 in accordance with Attachment A.

The plan approved by the Court does not include costs of acquiring or preparing sites for the new facilities. In addition, the Court acknowledges that the KCMSD will incur additional costs in relocating students while the approved capital improvements are completed. Accordingly, KCMSD is directed to submit these costs to the Court for approval and funding as soon as they become known.

The total amount of funding approved by the Court for those projects scheduled for completion by the fall of 1990 is $187,450,334. The State of Missouri and the KCMSD are jointly and severally liable for this amount with contribution between the two constitutional violators to be $93,725,167 each.

These capital improvements will have a service life of at least 30 to 50 years and the KCMSD will continue to benefit from them long after the hopeful success of the desegregation plan has been realized. For this reason the Court departs from the 3 to 1 apportionment generally set forth in previous remedial orders.

KCMSD'S 1987-88 MAGNET SCHOOL TRANSPORTATION PLAN

Also before the Court is KCMSD's motion for approval and funding of the 1987-88 incremental transportation costs attributable to the long-range magnet school plan ordered by the Court. KCMSD states that in 1986-87 it expended $1.4 Million to transport students to the three magnet programs at the Lincoln College Preparatory, the Southwest Cluster, and the Westport Community Applied Learning Magnet. KCMSD projects that the implementation of the 13 new magnet programs in 1987-88 will increase the total transportation costs for the magnet schools to $4,490,836. However, approximately $2.2 Million of this amount represents the cost that would have been incurred in operating traditional transportation routes at these schools even if there had been no magnet school program. Thus, KCMSD requests the Court to order the State to pay 75% of the remaining $2,294,075 cost of transportation required by the magnet program.

In response, the State requests that the plan be denied in its entirety or in the alternative that a hearing should be held at a future date to allow adequate discovery as to how and by whom the plan was developed and whether it is adequate and cost effective. As stated earlier, the parties should confer and see if they can reach an agreement on a plan. If needed, the parties may engage in discovery and if necessary a hearing will be held during the week of December 14, 1987. The KCMSD may implement the plan if it desires with the understanding that the Court has not approved the plan or ordered the State to fund any portion of the plan over and above the regular State aid under the standard formula.

KCMSD'S MOTION FOR FUNDING RELIEF

In its order of July 6, 1987, the Court deferred ruling on KCMSD's motion for funding relief until after the Court had ruled on the long-range capital improvement plan. The Court did so because it wanted an accurate estimate of not only KCMSD's deficit through fiscal year 1987-88, but also KCMSD's financial obligations under the overall desegregation plan through 1991-92.

Before setting forth the financial obligations of the KCMSD under the remedial plan, the Court must correct its order of July 6, 1987 which approved the year 3 desegregation budget. The Court, pursuant to the request of the KCMSD, included the 1987-88 implementation cost of the long-range magnet school plan in the 1987-88 desegregation budget. The total implementation cost for the 1987-88 magnets is $17,137,993, of which $13,946,729 was previously approved by the Court in its order of November 12, 1986. In that previous order, the Court found the State of Missouri and the KCMSD jointly and severally

liable for $8,908,406 of this amount, with the State solely liable for $5,038,323. This apportionment of liability for the $13,946,729 remains unchanged as will the Court's apportionment for the remaining implementation costs approved in the November 12, 1986 order. While the Court's apportionment for the KCMSD is more than 25% in year 1987-88 under the November 12, 1986 order, the percentage of liability for the implementation costs decreases to approximately 13% in 1991-92 under the plan. The KCMSD's total portion of the implementation costs and capital expenditures for the long-range magnet school plan approved in the November 12, 1986 order is approximately 25%, and thus is consistent with the Court's previous orders.

Therefore, in determining KCMSD's contribution to the year 3 desegregation budget, the Court mistakenly applied 25% to the entire 1987-88 implementation cost of the long-range magnets when the liability for $13,946,729 of that amount had already been apportioned. The 25% should only have been applied to the $3,191,264 in additional magnet base costs that the Court approved in its July 6, 1987 order. Therefore, the Court corrects page 12 of the order to reflect the following apportionment:

1987-88 Desegregation Budget

	Total	KCMSD'S Contribution	State's Contribution
Public Information	30,000.00	7,500.00	22,500.00
Desegregation Monitoring Office	– 0 –		
Program Evaluation	– 0 –		
Desegregation Monitoring Committee	256,228.00	64,057.00	192,171.00
Effective Schools	6,555,000.00	1,638,750.00	4,916,250.00
Reduction in Class Sizes Total	8,450,135.00	2,112,534.00	6,337,601.00
Summer School	1,295,764.00	323,941.00	971,823.00
Full Day Kindergarten	1,826,964.00	456,741.00	1,370,223.00
Before and After School Tutoring	233,759.00	58,440.00	175,319.00
Early Childhood Education	3,102,178.00	775,545.00	2,326,633.00
Long-Range Magnet School Plans	17,137,993.00	5,252,019.00	11,885,974.00
1986-87 Magnets	12,257,529.00	3,064,383.00	9,193,147.00
AAA Achievement	6,340,614.00	1,585,154.00	4,755,460.00
SWAS, DRP and STEPS	– 0 –		
Facilities Improvements (interest)	353,061.00	88,265.00	264,796.00
Totals	57,839,225.00	15,427,329.00	42,411,897.00

In calculating the financial obligations of the KCMSD under the Court's overall plan for which the district lacks funding, the Court finds that the KCMSD suffered a deficit of $1,092,365 in 1986-87 in implementing the long-range magnet school plan based on its obligation of $4,-158,136 and expenditures of $3,065,771. In addition, the Court approved a total of $60,234,436 in capital improvements for the long-range magnet plan in its orders of November 12, 1986 and April 29, 1987, with KCMSD's share set at $30,117,218. KCMSD has currently expended $3,027,413 for these improvements in 1986-87 but is without revenues to fund the balance of its share of these capital improvements, or $27,089,805.

For fiscal year 1987-88, KCMSD projects an operating budget of $121,342,253 and total revenues of $110,558,418, creating a deficit of $10,783,835. Included in the operating budget is approximately $7.15 Million for additional teachers and for salary increases for present teachers, $2,240,000 for facilities maintenance, and $869,189 for special education students. The AFT 691 has moved the Court to order a teacher's salary schedule larger than that included in the KCMSD 1987-88 operating budget.

The Court finds that the KCMSD has an obligation not only to eliminate the effects of unlawful segregation but also to insure that there is no diminution in the quality of its regular academic program. *Bradley v. Milliken*, 540 F.2d 229, 245 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977), *citing Hart v. Community School of Brooklyn*, 383 F.Supp. 699, 741 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). Therefore, it is essential that the KCMSD have sufficient revenues to fund an operating budget which can provide quality education, including a high quality faculty. The Court is quite

aware that the KCMSD's teacher salary position, in comparison with the surrounding school districts, has deteriorated significantly because of KCMSD's failure to obtain passage of a tax levy to fund teacher salary raises. Consequently, KCMSD's ability to attract new teachers and retain present teachers has been restricted. While the revised salary schedule proposed by the KCMSD would not equal those in suburban districts, it will certainly make the KCMSD more attractive to new teachers and more pleasing to its present teachers. As stated at the beginning of the order, the Court will not order either of the salary proposals submitted by the KCMSD and AFT 691 because this decision properly lies within the discretion of the school board. However, the Court will provide KCMSD with revenues of $7.147 Million per fiscal year through 1991-92 to fund teacher salary increases, and revenues of $3,109,189 per year to fund the costs of facilities maintenance and special education students.

The KCMSD is also without resources to finance its portion of the 1987-88 desegregation budget, $15,427,329, which includes the 1987-88 implementation cost of the long-range magnet school plan. In addition, the KCMSD is without the funds to pay its proposed share of the 1987-88 transportation costs of the magnet plan, estimated by it to be $573,518. KCMSD is also obligated in 1987-88 to fund $6,069,801 in capital improvements pursuant to the long-range capital improvement plan approved by the Court. Finally, the Court estimates that site selection and student relocation costs associated with the long-range capital improvement plan will be approximately $4 Million per year, with KCMSD's portion to be $2 Million per year (affidavit of Roger Gaunt). In summation, the

KCMSD has financial obligations under the Court's overall desegregation plan for 1986-87 and 1987-88 of $62,509,653 for which it lacks resources to fund.

In fiscal year 1988-89, the KCMSD is obligated to fund an estimated $4,454,203 for implementation of the long-range magnet school plan and $27,399,873 in capital improvements pursuant to the long-range capital improvement plan. The Court projects that KCMSD's portion of the magnet school transportation costs for each of the next four fiscal years will be $573,518. The Court also projects that the KCMSD will have an operating budget deficit of $10,256,835 for fiscal years 1988-89 through 1991-92 due to expenditures needed for teacher salary increases, facilities maintenance, and special education students. In addition, the Court estimates that the 1988-89, 1989-90, 1990-91, and 1991-92 desegregation budgets at approximately $44,000,000 per fiscal year, excluding the long-range magnet costs approved by the Court in its November 12, 1986 order, because of the continuing cost of the remedial programs previously ordered by the Court. Therefore, the Court finds that the KCMSD will experience a deficit of approximately $11,000,000, or 25% of the desegregation budget, in each of those fiscal years. In summation, the Court projects a total deficit of $53,684,429 for the KCMSD for 1988-89.

Similarly in 1989-90, the Court projects that the KCMSD will experience a deficit of $5,027,721 in long-range magnet costs, $63,555,647 in capital improvement costs, $10,256,835 in operating budget, and $11,000,000 in desegregation budget, totaling $89,840,203. Using the same method of calculation, the projected deficits for years 1990-91, and 1991-92 are $42,543,837 and $33,823,793 respectively, bringing the total deficit to $282,401,915. A

summary of the KCMSD's known and projected obligations through 1991-92 under the Court's desegregation plan is set forth in Attachment B.

In its motion for funding relief, the KCMSD requested the Court to enjoin the rollback in the real estate tax levy otherwise required under Proposition C (R.S. Mo. §§ 163.050 and 164.013). The KCMSD also requested the Court to order the State of Missouri to advance to it funds for its desegregation and operating expenses that it is unable to fund. The KCMSD would then repay the State when resources were available.

The Court will not require the State of Missouri to fund any of KCMSD's financial obligations under the court-ordered desegregation programs. However, the United States Court of Appeals for the Eighth Circuit stated clearly that the desegregation remedy ordered by this Court shall be fully funded. *Jenkins v. State of Missouri*, 807 F.2d 657, 686 (8th Cir. 1986), and has discussed in detail the procedure the district court is to follow in achieving this goal. *Liddell v. State of Missouri*, 731 F.2d 1294, 1319-23 (8th Cir. 1984).

The record clearly shows that the KCMSD is unable with its present resources to raise revenues to fund its share of the costs assessed under the desegregation orders. The KCMSD has exhausted all available means of raising additional revenue, including presenting a bond issue in 1987 and tax levy increase proposals to the voters in four separate elections in 1986 and 1987. The KCMSD has not had a bond passage or a levy increase since 1969. As a result, its physical facilities have literally rotted.

Because of KCMSD's inability to raise additional funds under the present system, the Court encouraged the

Missouri General Assembly to "explore the possibility of enacting legislation that would permit a district involved in a desegregation plan more versatility than it presently has to raise funds with which to support the program." November 12, 1986 Order at p. 7. Such legislation was introduced but was received unfavorably and ultimately failed. In addition, the State of Missouri and the KCMSD have been unable to agree on an alternate method of raising KCMSD's share of the desegregation costs. Therefore, the Court has explored all the alternatives set forth by the Eighth Circuit and is left with no choice but to exercise its broad equitable powers and enter a judgment that will enable the KCMSD to raise its share of the cost of the plan and therefore insure that the constitutional violations committed by the KCMSD and the State of Missouri are cured.

The United States Court of Appeals for the Eighth Circuit has stated that such relief may only be granted after the Court has conducted an evidentiary hearing. *Liddell v. State of Missouri*, 731 F.2d 1294, 1323 (8th Cir. 1984). However, the plaintiffs, the KCMSD, and the State of Missouri have stated that they do not request an evidentiary hearing on this issue, and consent to the Court's entry of a judgment based on the record developed in this case.

A district court's broad equitable power to remedy the evils of segregation includes the power to order tax increases and bond issuances. *Liddell v. State of Missouri*, 731 F.2d at 1322. The United States Supreme Court has stated that a tax may be increased if "necessary to raise funds adequate to . . . operate and maintain without racial discrimination a public school system." *Griffin v. School*

Board of Prince Edward County, 377 U.S. 218, 233, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964).

A studied estimate of the additional revenues needed by the KCMSD to meet its share of the desegregation costs during the next five years reveals the sum of approximately $150,000,000 for capital improvements and $135,000,000 for other desegregation costs.

In its order of June 14, 1985, this Court stated that it was reluctant to take any action to increase taxes. The Court now affirms the statement made in its order of August 25, 1986 that it is not insensitive to the fact that those patrons of the KCMSD who voted in previous elections have refused to approve a tax levy increase and a bond issue. However, a majority has no right to deny others the constitutional guarantees to which they are entitled. This Court, having found that vestiges of unconstitutional discrimination still exist in the KCMSD, is not so callous as to accept the proposition that it is helpless to enforce a remedy to correct the past violations. Failure of the KCMSD to come forward with its share of funds to implement the remedial plan would certainly operate to hinder vindication of federal constitutional guarantees to which the school children in the KCMSD are entitled. This Court cannot shrink its sworn duty to uphold the Constitution of the United States (p. 4). The Court must weigh the constitutional rights of the taxpayers against the constitutional rights of plaintiff students in this case. The Court is of the opinion that the balance is clearly in favor of the students who are helpless without the aid of this Court.

The Court is of the firm conclusion that it has no alternative but to impose tax measures which will enable KCMSD to meet its share of the cost of the desegregation

plan. At the Court's request the parties have submitted estimates on revenues which would be generated through various tax measures.

The plaintiffs have moved the Court to require KCMSD to issue $144,175,000 in general obligation bonds, to add a $1.73 property tax levy in the KCMSD, and to impose a 1/2% sales tax effective January 1, 1989 within the KCMSD to permit KCMSD to fund its share of the costs of the desegregation orders.

During the hearing on the liability issue in this case there was an abundance of evidence that many residents of the KCMSD left the district and moved to the suburbs because of the district's efforts to integrate its schools but continue to be employed in the district. After careful consideration, the Court has determined that it would be equitable to involve these people in a plan to help defray the district's desegregation expense.

The Court will impose a 1.5% increase as a surcharge on the Missouri State Income Tax (raising the present rate on individuals from 6% to 7.5%) on residents and nonresidents of the KCMSD, including business associations, partnerships and corporations who earn salaries, wages, commissions and all other compensation and income subject to the Missouri State Income Tax for work done, services rendered and business or other activities conducted within the KCMSD. This surcharge shall become effective for all income earned after September 25, 1987. All employers and persons presently legally responsible for withholding the Missouri State Income Tax shall have the same responsibility for withholding the 1.5% increase. The State through its Department of Revenue shall collect the increased tax and remit it to

the KCMSD within thirty days after its receipt of same. KCMSD shall promptly prepare and publish a legal notice of this income tax increase (surcharge) giving notice to all employers within the district and to all persons and entities who receive an income for activities performed within the district.

Revenue generated by the income tax surcharge shall be used to retire capital improvement bonds which are herein authorized. It is anticipated that the surcharge will create sufficient revenue for the KCMSD to meet its portion of the cost of the capital improvement plan. The surcharge shall remain in effect until such time as the bonds are retired or until other provisions are adopted to insure their retirement.

The KCMSD presently has a tax levy of $2.05 per $100.00 assessed valuation. This is much less than the tax levy of any neighboring school district. In order to fund the other desegregation costs other than capital improvements for which it is obligated the district needs approximately $27,000,000 additional per year through the 1991-92 school year. A property tax increase of $1.95 per $100 assessed valuation would generate about $27,000,000 annually. Therefore the Court will order the property tax levy to be increased to $4.00 per $100 assessed valuation through the 1991-92 fiscal year.

The KCMSD is directed to issue capital improvement bonds in the total amount of $150,000,00 to be retired within 20 years from the date of isue. The board is authorized to issue credit enhanced leasehold revenue bonds and general obligation bonds in such proportion as the school board, in its discretion, determines to be most advantageous to the district.

In accordance with the foregoing memorandum, it is

ORDERED that the motion of the KCMSD for the approval of its capital improvement plan is approved as modified herein; and it is further

ORDERED that the motion of the KCMSD for approval of its student transportation plan for the long-range magnet school plan is deferred and if a hearing is necessary on the plan it is set to commence on Monday, December 14, 1987 at 9:00 a.m.; and it is further

ORDERED that the motion of AFT 691 for alternate funding relief regarding the salaries of the KCMSD teachers is denied; and it is further

ORDERED that the motion of KCMSD for funding relief is granted in part in that it is ordered that in order to fund the obligation of the KCMSD for the desegregation program, a surtax of 1.5% is added to the Missouri State Income Tax for all persons and entities receiving income for work done, services rendered, and income received from activities within the KCMSD and the tax levy for the KCMSD is raised to $4.00 per $100 assessed valuation; and it is further

ORDERED that said increased revenue shall be applied to satisfy the obligations of the KCMSD as set forth in this memorandum.

/s/ Russell G. Clark
Russell G. Clark, District Judge
United States District Court

Dated: September 15, 1987

(Filed October 27, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

v.

THE STATE OF MISSOURI, et al.
Defendants.

ORDER

Presently before the Court are applications to intervene filed by Jackson County, Missouri, and Icelean Clark, *et al,* a group of individual and corporate taxpayers. After careful consideration, the Court will deny the taxpayers' motion for leave to intervene but will permit them to participate in *amici curiae.* The Court will deny the motion of Jackson County, Missouri for leave to intervene.

Applicants Icelean Clark, *et al.* seek leave to intervene as a matter of right, or in the alternative, permissive intervention, to challenge the Court's order of September 15, 1987 in which it increased taxes to fund KCMSD's obligation for the desegregation program. Pursuant to Rule 24, Federal Rules of Civil Procedure, intervention, whether as a matter of right or permissive,

is only appropriate if the application is timely. The determination of whether an application to intervene is timely is within the discretion of the trial court. *NAACP v. New York,* 413 U.S. 345, 366 (1973). The three factors usually considered in making this determination are: (1) how far the proceeding has gone when the movant seeks to intervene, (2) prejudice which resultant delay might cause to the other parties, and (3) the reason for the delay. *Nevilles v. EEOC,* 511 F.2d 303, 305 (8th Cir. 1975). For the following reasons, the Court finds that the taxpayers' motion to intervene is not timely.

First, the Court has already considered and passed on the issue of how KCMSD's portion of the desegregation plan shall be funded. Secondly, the taxpayers have had ample opportunity to file a timely application. In June, 1985 the Court discussed at length the ability of the Court to raise taxes to fund its desegregation remedy and actually enjoined the tax levy rollback required by §164.013, Mo.Rev.Stat. to raise revenues to fund the year one desegregation costs for which KCMSD was obligated. *Jenkins v. State of Missouri,* 639 F.Supp. 19, 44-45 (W.D. Mo. 1985). On August 25, 1985, the Court again enjoined the tax levy rollback to raise revenues to fund KCMSD's desegregation costs in year two of the desegregation plan. In its order dated July 6, 1987 the Court stated its intention "to generate KCMSD's portion of the desegregation funding through imposition of either an earnings tax or a state income tax surcharge." Order at p. 16.

For these reasons, the Court finds that the taxpayers are not entitled to intervene pursuant to Rule 24, Federal Rules of Civil Procedure. However, the Court will permit Icelean Clark, *et al.* to proceed in this case as *amici*

curiae. Penick v. Columbus Education Association, 574 F.2d 889, 890 (6th Cir. 1978).

Jackson County, Missouri has also moved the Court for leave to intervene to challenge the tax increases ordered by the Court. Jackson County is already before the Court on the issue of whether it is obligated to adjust and collect the property tax as ordered by the Court on September 15, 1987. Therefore, a motion to intervene on that issue is unnecessary. Regarding all other issues in this case, including the specific remedy ordered by the Court, Jackson County is not entitled to intervene pursuant to Rule 24, Federal Rules of Civil Procedure, because its renewed application is untimely for the same reasons set forth in the Court's analysis of the taxpayers' motion to intervene. Furthermore, the Court finds that intervention at this late stage in the proceedings would unduly delay the implementation of the remedy to which the plaintiffs are entitled.

Accordingly, it is hereby

ORDERED that the motion of Icelean Clark, *et al.* to intervene is denied; and it is further

ORDERED that Icelean Clark, *et al.* are permitted to proceed in the case as *amici curiae;* and it is further

ORDERED that the motion of Jackson County, Missouri to intervene is denied.

/s/ Russell G. Clark
Russell G. Clark
United States District Judge

Oct. 27, 1987

(Filed August 19, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1934
No. 86-2537
No. 87-1749
No. 87-2299
No. 87-2300
No. 87-2588

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, Barbara Pugh; Cynthia Winters, by her next friend, David Winters; on behalf of themselves and all others similarly situated,

and

American Federation of Teachers,
Local 691,
Appellees,

v.

The State of Missouri, Honorable John Ashcroft, Governor of the State of Missouri, Wendell Bailey, Treasurer of the State of Missouri, Missouri State Board of Education,

Roseann Bentley,
Dan Blackwell,
Terry A. Bond, President,
Delmar A. Cobble,
Grover Gamm,
Jimmy Robertson,
Robert L. Welling,
Donald E. West,

Members of the Missouri State Board of Education,

Arthur L. Mallory, Commissioner of Education of the State of Missouri,
Appellants,

and

School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof,
Appellees.

No. 87-2565

Kalima Jenkins, by her friend, Kamau Agyei, et al.,

and

American Federation of Teachers,
Local 691,
Appellees,

v.

The State of Missouri, et al.,

and

School District of Kansas City,
Missouri, et al.,
Appellees.

Icelean Clark; Bobby Anderton; Eleanor Graham; John C. Howard; Craig Martin; Gay D. Williams; Kansas City Mantel & Tile Co.; Coulas & Griffin Insurance Agency, Inc.; Sharon Dunham; Lindsay K. Kirk; Linda Frazier; Rick Feierabend; Linda Hollenbeck; James Hollenbeck; Susan Horseman; and Clifford M. Horseman,
Appellants.

No. 87-2589

Kalima Jenkins, by her friend, Kamau Agyei, et al.,

and

American Federation of Teachers,
Local 691,

v.

The State of Missouri, et al.,

and

School District of Kansas City,
Missouri, et al.,
Appellees.

Icelean Clark; Bobby Anderton; Eleanor Graham; John C. Howard; Craig Martin; Gay D. Williams; Kansas City Mantel & Tile Co.; Coulas & Griffin Insurance Agency, Inc.; Sharon Dunham; Lindsay K. Kirk; Linda Frazier; Rick Feierabend; Linda Hollenbeck; James Hollenbeck; Susan Horseman; and Clifford M. Horseman,
Jackson County, Missouri;
Appellants.

No. 87-2659

Kalima Jenkins, by her friend, Kamau Agyei, et al.,
Appellants,

and

American Federation of Teachers, Local 691,

v.

The State of Missouri, et al.,
Appellees,

and

School District of Kansas City, et al.,
Appellees.

No. 88-1073

Kalima Jenkins, by her friend, Kamau Agyei, et al.,
Appellees,

and

American Federation of Teachers, Local 691,

v.

The State of Missouri, et al.,

and

School District of Kansas City, Missouri, et al.,
Appellees,

Jackson County, Missouri; William Waris; Bernice J. Conley; Gary Panetheire; Beverly O. Ross; Michael Bendergast, their officials,
Appellants.

No. 88-1456

Kalima Jenkins, by her friend, Kamau Agyei, et al.,

and

American Federation of Teachers, Local 691,

v.

The State of Missouri, et al.,
Appellees,

and

School District of Kansas City, et al.,
Appellants.

Appeal from the United States District Court
for the Western District of Missouri.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court is affirmed with respect to the scope of the remedy. We also affirm its order with respect to the property tax, but remand for further modifications as provided in this opinion. We reverse the judgment of the district court with respect to the income tax surcharge and stay any further collection. Finally, we affirm the order of the district court

denying the motions of the Clark group and Jackson County to intervene.

August 19, 1988

/s/ Robert D. St. Vrain

A True Copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(3) (3) (2)

Nos. 88-1150,-1194,-1228

Supreme Court, U.S.
FILED
MAR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,
ICELEAN CLARK, *et al.*,
JACKSON COUNTY, MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENTS JENKINS, *et al.* IN OPPOSITION TO CERTIORARI

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78 pp

Counter-Statement of Questions Presented

1. Whether the petitions are all jurisdictionally out of time.

2. Whether a federal district court, which has made detailed findings (upheld by the Court of Appeals) documenting long-maintained racial discrimination and segregation in the Kansas City, Missouri School District (KCMSD) and the extensive and continuing effects of that constitutional violation, should seek to fashion relief that will (insofar as possible) achieve the goal of providing students in the KCMSD with the same quality of integrated educational opportunities that the court determines would exist if the violation had not occurred.

3. Whether a federal district court, in such circumstances, should withhold relief that is adequate to

redress the educational harms occasioned by the constitutional violation -- in order to avoid the necessity of issuing a decree against state or local officials requiring them to raise funds (including by increasing tax levies) sufficient to implement a complete remedy for the violation.

4. Whether a federal district court, in such circumstances, lacks the power to effectuate a complete remedy for violations of the Fourteenth Amendment by directing that tax levies be increased in order to provide the revenue necessary to afford relief to the victims of unconstitutional discrimination and school segregation.

5. Whether a federal district court, in such circumstances, properly denied intervention to individuals and governmental entities whose petitions were not

submitted until after the tax levy measures which they sought to challenge had been ordered, despite the court's earlier announcement that it was likely to take action which would raise tax levies in order to assure implementation of an adequate remedy for serious and sustained Fourteenth Amendment violations.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1988

Nos. 88-1150, -1194, -1228

STATE OF MISSOURI, et al.,

ICELEAN CLARK, et al.,

JACKSON COUNTY, MISSOURI, et al.,

Petitioners,

v.

KALIMA JENKINS, et al.

On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF RESPONDENTS JENKINS, et al. IN OPPOSITION TO CERTIORARI

Jurisdiction

None of the petitions to which this response is addressed was filed within 90 days of the issuance of the

final judgment below on August 19, 1988, as required by 28 U.S.C. § 2101(c) (1984),[1] nor was timely application for extension sought and granted by this Court or a Justice of the Court. Therefore, for the reasons articulated in the Brief in Opposition of Respondent Kansas City, Missouri School District (KCMSD) in these matters, in which the Jenkins respondents join, this Court lacks jurisdiction to grant the present petitions.[2] This fact alone is a sufficient basis for denying the writs.

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[1]Rule 20.4 of this Court, which tolls the 90-day period for filing a petition only if a timely petition for rehearing is filed, is consistent with Rules 35, 40 and 41, Fed. R. App. P., which establish an automatic stay of the issuance of a Court of Appeals' mandate during the pendency of a timely petition for rehearing but state explicitly that the pendency of a suggestion of rehearing in banc "shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate" [Rule 35(c)].

[2]We have lodged with the Clerk of this Court ten copies of the Petitions for Rehearing En Banc filed below. Examination of these documents establishes that none of the present Petitioners requested rehearing; rather, all sought rehearing in banc. There were thus no "petitions for rehearing" subject to being denied as provided in the amended mandate of the Court of Appeals issued sua sponte on January 10, 1989 (see State Pet. at A-1).

Counter-Statement of the Case

The Jenkins respondents join in the KCMSD respondents' Counter-Statement.

REASONS FOR DENYING THE WRITS

Introduction

The instant Petitions concern aspects of orders issued by the United States District Court for the Western District of Missouri in the final, remedial stages of protracted, complex, school desegregation litigation involving the Kansas City, Missouri public schools. The district judge who issued these orders has presided over the action since its initiation in 1977. He has observed and heard hundreds of witnesses, including scores with educational or other academic, as well as practical, expertise. He has considered thousands of documentary

and other exhibits, has personally viewed the KCMSD school facilities, and has issued numerous opinions and orders containing specific, detailed and particularized findings of fact that provide the foundation for his legal determinations and orders.

The district court's major conclusions and actions have been severely criticized, at different times, by both sides in the litigation but, with only minor exceptions, panels of the Court of Appeals and a majority of the Court sitting en banc have sustained the trial judge's careful fashioning of a remedy appropriate to the nature and scope of the constitutional violations which he found.

First, following lengthy trial proceedings, the district judge applied this Court's ruling in Milliken v. Bradley,

418 U.S. 717 (1974)(Milliken I) and rejected the contentions of the Jenkins and KCMSD respondents here, that the proof justified an inter-district remedy involving pupil reassignments between and/or consolidation of the KCMSD and nearby suburban school systems. The court also held that the historic pre- and post-Brown constitutional violations by the KCMSD and the State of Missouri had never been redressed but that their effects had been exacerbated by delay and neglect of the defendants' affirmative constitutional obligations for decades. It directed that the continuing effects of these violations should be ameliorated through a remedial plan involving voluntary inter-district assignments, creation of integrated magnet schools in the KCMSD, improvement of the KCMSD's capital plant and of its educational programs to correct

deficiencies attributable to the long period of segregated operation, and implementation of special programs to address educational deficiencies created by that segregation, see Milliken v. Bradley, 433 U.S. 267 (1977)(Milliken II). With the exception of some alterations in the allocation of remedial costs between the KCMSD and the State of Missouri, all of these determinations were approved by the Court of Appeals, and this Court declined to review the denial of mandatory inter-district relief. Jenkins v. Missouri, 593 F. Supp. 1485 (W.D. Mo. 1984), 639 F. Supp. 19 (W.D. Mo. 1985), modified in part and aff'd, 807 F.2d 657 (8th Cir. 1986)(en banc), cert. denied, 108 S. Ct. 70 (1987).

Thereafter, the district court continued closely to supervise the refinement and implementation of the

remedy[3] for the constitutional violations which it found, proceeding in step-by-step fashion.[4] It approved and rejected remedial components suggested by all parties, including the State of Missouri and the Jenkins and KCMSD respondents.[5] It has sought to achieve a fair

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[3]E.g., State Pet. App. [hereinafter Pet. App.] 104a, 106a (approving continuation of two programs for 1987-88 to "give the KCMSD another year to meet the projected enrollments"); 639 F. Supp. at 46, Pet. App. 129a (requiring KCMSD to submit a detailed plan for improving public information about its desegregation plan in light of inadequate results after prior order allocating funds for this purpose); 639 F. Supp. at 50-51, Pet. App. 137a-138a (ordering further reports on implementation of educational programs under decree).

[4]See, e.g., Pet. App. 77a (approving capital program only for projects scheduled to be completed by fall of 1990); id. at 79a (approving budget for construction project management team for three years only); id. at 191a (approving only initial capital improvement plan and postponing consideration of additional measures); 639 F. Supp. at 45, Pet. App. 199a (suspension of tax rollback for one year only to "provide the KCMSD with an opportunity to present a tax levy proposal to its patrons at the next regularly scheduled school election").

[5]See, e.g., 639 F. Supp. at 32-33, Pet. App. 173a (ordering implementation of State's Early Childhood program); Pet. App. 65a (rejecting KCMSD's and Jenkins' suggested regulations for tax collection); id. at 95a (declining to order central coordination of school-based programs sought by KCMSD); id. at 118a-19a (requiring KCMSD to bear cost of renovating building to house temporary performing arts magnet); 639 F. Supp. at 49, Pet. App.
(continued...)

and equitable allocation of the costs of constitutional compliance between the two joint tortfeasors, the State of Missouri and the KCMSD.[6] The parties have vigorously contested the litigation at the remedial stage; the judgment of the Court of Appeals of which Petitioners seek review resolved consolidated appeals from some thirteen separate orders issued by the trial court.[7] This time, the principal appellants were the State of Missouri and state officials. Again, however,

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[5](...continued)
135a (rejecting KCMSD's requested expansion of before- and after-school programs).

[6]E.g., Pet. App. 79a (requiring KCMSD to pay 50%, rather than 25% of capital construction costs because "the KCMSD will continue to benefit from the[new facilities construction] long after the hopeful success of the desegregation plan has been realized"); id. at 107a (adjusting budget to account for savings in expenditures at other schools as new magnets open); id. at 109a (requiring KCMSD to bear ongoing maintenance costs for facilities constructed or improved under decree).

[7]Jenkins v. Missouri, 855 F.2d 1295, 1299 n.2 (8th Cir. 1988), Pet. App. 4a n.2.

with minor modifications and reversal only with respect to one separable aspect concerning funding,[8] the Court of Appeals approved the trial judge's careful supervision of this action.

It is against this background of painstaking attention by a district court with intimate familiarity with the particularities of the case, and whose actions have been almost wholly sustained on two occasions by the Court of Appeals, that this Court must assess the necessity and desirability of reviewing the judgment below.

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[8]The Court of Appeals sustained the district court's order raising the property tax millage in the KCMSD because "the property tax is the established source of revenue for Missouri school districts" and the order was the functional equivalent of "set[ting] aside restrictions or limitations imposed by state law that impede the disestablishment of a dual school system" (855 F.2d at 1315, Pet. App. 39a-40a). It reversed that portion of the court's orders that imposed an income tax surcharge on individuals working within the KCMSD because "the income tax surcharge restructures the State's scheme of school financing and creates an entirely new form of taxing authority" (855 F.2d at 1315, Pet. App. 40a).

Petitioners raise only a few issues.[9] Despite the provocative language of their filings, none of the questions they seek to present warrants the plenary attention of this Court because, as we show below, the lower courts have faithfully and unexceptionably applied well established legal principles and followed the decisions of this Court.

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[9]Petitioners in Nos. 88-1194 and 88-1228 sought intervention in this litigation in the district court, which was denied on the grounds that their requests were untimely; that denial was affirmed by the court below. The only question properly presented by these arties, therefore, is the correctness of the ruling affirming the denial of intervention.

Petitioners in No. 88-1150 do not contest either their own liability or the general remedial approach of the district court (improvements of KCMSD's capital facilities and educational programs together with the creation of magnet schools to bring about desegregation through voluntary means), an approach that they supported in the trial court, see infra note 12. Instead, they charge, first, that the district court has shaped the particulars of this remedial approach to achieve goals other than the effective dismantling of the long-maintained dual system of schools in the KCMSD. Second, they assert that the district court was without power to require the KCMSD to provide a portion of the resources necessary to implement the remedy through an increase in its property tax levy (a requirement which the court imposed only after both the KCMSD electorate and the State legislature had refused or failed to create a reliable funding mechanism for this purpose).

I

This Case Does Not Merit Review Because The Remedy Ordered By The District Court Is Appropriately Designed To Redress The Proven Constitutional Violations And Their Effects, And It Does Not Exceed The Scope Of The Trial Court's Broad Equitable Power To Afford Complete Relief To The Victims of Unconstitutional Segregation

This is a case in which the extensive and continuing harmful effects of the long-sustained constitutional violations committed by the State of Missouri and the KCMSD were identified with precision and detail in exhaustive proceedings before the district court. On that record, the trial court was charged, in fashioning a remedy, with the obligation of "restor[ing] the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[10] In the

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[10]Milliken II, 433 U.S. at 280.

orders affirmed below, in those previously reviewed by the Court of Appeals, and through its exercise of continuing jurisdiction during the transition from a dual school system, the district court has sought to provide a complete remedy that will be practicable, workable, and successful.[11]

Petitioners contest neither liability nor the broad outlines of the relief ordered by the trial court.[12]

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[11]The trial court described its responsibility and authority as follows:

> . . . [T]he goal of a desegregation decree is clear. The goal is the elimination of all vestiges of state imposed segregation. In achieving this goal, the district court may use its broad equitable powers, recognizing that these powers do have limits. Those limits include the nature and scope of the constitutional violation, the interests of state and local authorities in managing their own affairs consistent with the constitution, and insuring that the remedy is designed to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.

(639 F. Supp. at 23, Pet. App. 153a.) See Hutto v. Finney, 437 U.S. 678, 688 & n.12 (1978).

[12]See, e.g., 593 F. Supp. at 24, Pet. App. 155a ("No party to (continued...)

Implicitly recognizing the difficulties inherent in asking this Court to entertain questions that are fact-bound and unique to the circumstances of an individual case, Petitioners have wrenched language in the district court's opinions out of context in an effort to describe legal questions more susceptible of being characterized as worthy of this Court's discretionary review. A fair reading of the district court's orders demonstrates,

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[12](...continued)
this case has suggested that this plan should not contain components designed to improve educational achievement. In fact, it is 'appropriate to include a number of properly targeted educational programs in a desegregation plan' (State Plan at 5)"); 593 F. Supp. at 26, Pet. App. 158a ("both the State of Missouri and the KCMSD endorse achieving AAA status, reducing class size at the elementary and secondary level, summer school, full day kindergarten, before and after school tutoring and early childhood development programs"); 593 F. Supp. at 40, Pet. App. 189a ("The State (State Plan p. 111) proposes a $20,000,000 facilities improvement program with the state making a one time contribution not to exceed $10,000,000. . . . The State does not dispute that there are serious structural and environmental problems throughout the facilities utilized by the KCMSD"); 855 F.2d at 1299, Pet. App. 5a ("In this case the district court dealt with undisputed constitutional violations and its series of orders were necessary to remedy the lingering results of these violations, since local and state authorities had defaulted in their duty to correct them.").

however, that the legal issues relating to the goals of the remedy that are posited by Petitioners simply do not arise in this matter.

A. The district court did not require a magnet plan "to attract additional non-minority students" for the purpose of transforming the KCMSD into "a district . . . with some particular number of white and black students"

The State's Petition attacks the scope of the magnet school program to be established in the KCMSD under the district court's orders:

> No other court has required a district to turn most of its schools into magnet schools, and no other court has imposed a duty to attract more students of a designated race. . . . [T]he right at issue . . . is not [a right] to be enrolled in a district or school with some particular number of white and black students.

(Pet. at 15.) The State simply ignores the trial court's

lucid elaboration of the basis for its magnet school requirements.

In its initial remedial order the court recognized its obligation "to further explore any reasonable potential for achieving further desegregation" of the KCMSD schools (639 F. Supp. at 38, Pet. App. 184a). It declined to order mandatory reassignments within the KCMSD

> [u]nless and until th[e study suggested by the State of Missouri] or other studies show that further mandatory student reassignment can achieve additional desegregation without destabilizing the desegregation which presently exists.

(Id.)[13] On the other hand, the district court had heard evidence from a number of expert witnesses that "[m]agnet schools can be utilized to assist the State of

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[13]Cf. Green v. County School Bd. of New Kent County, 391 U.S. 430, 441 (1968)(voluntary enrollment option may have a place in a desegregation plan in the absence of alternatives "promising speedier and more effective conversion to a unitary, nonracial school system").

Missouri and the KCMSD in expanding desegregative educational experiences for its students" (639 F. Supp. at 34, Pet. App. 176a), and it required submission of a plan to utilize this voluntary desegregation tool (639 F. Supp. at 34-35, Pet. App. 177a).[14]

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[14]The concept of a magnet school is to offer a different, improved or unique curriculum or service (such as before- or after-school day care) that will attract voluntary attendance by students of all races. This Court has approved of magnet schools as a desegregation tool on a number of occasions. See, e.g., Milliken II, 433 U.S. at 272; Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 488 (1979), and the courts of appeals and district courts have consistently approved desegregation plans incorporating magnet schools as an 1alternative to mandatory and involuntary reassignments of students. See Diaz v. San Jose Unified School Dist., 861 F.2d 591, 596 (9th Cir. 1988); United States v. Yonkers Bd. of Educ., 837 F.2d 1181; 1238 (2d Cir. 1987), cert. denied, 108 S. Ct. 2821 (1988); Liddell v. Missouri, 731 F.2d 1294, 1310 (8th Cir.), cert. denied, 469 U.S. 816 (1984); Davis v. East Baton Rouge Parish School Bd., 721 F.2d 1425, 1440 (5th Cir. 1983); Arthur v. Nyquist, 712 F.2d 809, 811-13 (2d Cir. 1983), cert. denied, 464 U.S. 892 (1983); Berry v. School Dist. of Benton Harbor, 698 F.2d 813 (6th Cir.), cert. denied, 464 U.S. 892 (1983); United States v. Texas Educ. Agency, 679 F.2d 1104 (5th Cir. 1982); Morgan v. Kerrigan, 530 F.2d 401, 428 (1st Cir.), cert. denied, 426 U.S. 935 (1976), subsequent proceeding sub nom. Morgan v. McDonough, 689 F.2d 265, 276 n.18 (1st Cir. 1982); Hart v. Community School Bd., 512 F.2d 37, 54-55 (2d Cir. 1975).

The Congress and the President have also expressed unambiguous support for magnet programs as an effective and unintrusive remedy for school segregation. See S. Rep. No. 100-

(continued...)

The Court subsequently approved implementation of three magnet schools or clusters in the 1986-87 school year to "expan[d] the desegregative educational experience for KCMSD students" and to assess the potential success of this desegregation device:

> The magnet plan must be geared toward both remedial and desegregative goals and should maximize achievement of desegregation with a minimum amount of resources. The magnet program should provide long term stability in terms of future financing as well as incorporate a carefully designed marketing program based upon a careful analysis of the plans' impact upon other components of the desegregation plan. Thus, future development of a magnet school program

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[14](...continued)
222, 100th Cong., 1st Sess. 48 (1987)("Research has shown that magnet schools are the most successful means for promoting racial desegregation"), reprinted in 3 1988 U.S. Code Cong. & Adm. News 149 (June, 1988); Remarks on Signing the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, 24 Weekly Comp. of Pres. Doc. 540 (Apr. 28, 1988)(President Reagan "pleased to note that the bill reauthorizes the magnet school program and expands parental choice"); Hawkins-Stafford Amendments of 1988, Pub. L. No. 100-297, § 3993, 102 Stat. 231 (1988)(to be codified at 20 U.S.C. § 3023); Education for Economic Security Act, Pub. L. No. 98-670, § 703, 98 Stat. 1267, 1299 (1984).

> need not duplicate this initial phase of the magnet school effort.

(639 F. Supp. at 53, 55, Pet. App. 145a, 149a.) Based upon initial experience with these magnets and upon evidence adduced at additional hearings, the court ultimately determined to approve KCMSD's plan to establish a substantial number of magnet schools.

However, the court's Order makes it clear that the fundamental basis for "turn[ing] most of [KCMSD's] schools into magnet schools," as the State puts it, is to avoid the inequity which would occur if black students -- the victims of the State's and KCMSD's protracted unconstitutional conduct -- were restricted in their opportunities to benefit from the improved or unique educational experiences to be offered in magnet schools:

> The plan magnetizes such a large number of schools that every high school and middle school student will attend a magnet school. At the

elementary level, there would be a sufficient number of magnets to permit every student desiring to attend a magnet school to do so. The Court is opposed to magnetizing only a limited number of schools in a district . . . . In each [magnet] school there is a limitation as to the number of students who may be enrolled. Thus, for each non-minority student who enrolls in the magnet school a minority student, who has been the victim of past discrimination, is denied admittance. While these plans may achieve a better racial mix in those few schools, the victims of racial segregation are denied the educational opportunity available to only those students enrolled in the few magnet schools. This results in a school system of two-tiers as it relates to the quality of education. This inequity is avoided by the KCMSD magnet school plan.

(Pet. App. 122a.)[15]

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[15]As the Court of Appeals noted:

The State in its filings with the district court cautioned about creation of a two-tiered system of schools in which "existing schools are, or are perceived to be, markedly inferior." Response of State to KCMSD motion for approval of 1986-87 magnet programs, p. 12. The State's expert witness, Dr. Doyle, echoed this concern and suggested that one way to avoid the problem was to convert an entire school system to magnet schools. Tr. 376, 381-82, June 5, 1986. Another State's witness, Dr. Cooper, also agreed on cross-examination that the comprehensiveness of the plan was a step in the right

(continued...)

In the following paragraph of its Order, the district court did comment, as the State emphasizes, that

> Most importantly, the Court believes that the proposed magnet plan is so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs.

(Pet. App. 123a). However, that comment is quoted entirely out of context by the State.[16] It does not refer

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[15](...continued)
direction. Tr. 890, Sept. 18, 1986. The district court's finding regarding the need for the number of magnet schools authorized by the plan is amply supported by the State's own evidence.

(855 F.2d at 1304, Pet. App. 15a.) Compare United States v. Pittman, 808 F.2d 385, 393 (5th Cir. 1987)(Higginbotham, J., concurring)(warning that selective magnet schools exclude a large number of "average" black students); Davis v. East Baton Rouge Parish School Bd., 721 F.2d at 1437 n.10 (magnet plan could create new dual system of white magnets and black regular schools).

[16]The complex analyses which undergird the district court's remedial orders in this case cannot be reduced to the two or three phrases that are taken out of context and repeatedly intoned throughout the Petition without seriously distorting the trial court's reasoning and actions. Unfortunately, the Petition contains numerous erroneous and misleading characterizations of the holdings below.

(continued...)

to the reasons for the district court's approval of the number of magnet schools provided by the plan. Instead, it is the concluding sentence of an entirely new paragraph of the Order in which the district court found that the particular magnet themes and emphases suggested in the KCMSD plan were likely to succeed in attracting a desegregated enrollment.[17] Thus, the State's

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[16](...continued)

For one example, the State charges that "the court [of appeals] means to . . . apply a far-reaching theory of 'but-for' causation--one that would make the State liable for an effect of desegregation, rather than for effects of segregation itself" (Pet. at 17-18). In fact, in the portion of its opinion to which the Petition makes reference, the Court of Appeals sustained the district court's orders on the basis of the trial judge's conclusion that the discriminatory and segregative practices of the KCMSD had caused whites to leave or avoid the system's public schools. See 855 F.2d at 1302, Pet. App. 11a-12a. It was the State of Missouri itself which raised the question of so-called "white flight from desegregation," and what the State now terms a "far-reaching theory of 'but-for' causation" is merely the Court of Appeals' rejection of the State's contention that there was an intervening, independent cause of white enrollment loss in the KCMSD that excused the joint tortfeasors of all responsibility to correct the effects of their prior constitutional violations. See 855 F.2d at 1303, Pet. App. 13a.

[17]The entire paragraph is as follows:

(continued...)

tendentious argument that a majority-black school system is not unconstitutional (Pet. 15-19) is simply beside the point.[18] The basis for the trial court's approval of

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[17](...continued)
The Court also finds that the proposed magnet plan would generate voluntary student transfers resulting in greater desegregation in the district schools. The suggested magnet themes include those which rated high in the Court ordered surveys and themes that have been successful in other cities. Therefore, the plan would provide both minority and non-minority district students with many incentives to leave their neighborhoods and enroll in the magnet schools offering the distinctive themes of interest to them. Most importantly, the Court believes that the proposed magnet plan is so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs.

[18]In addition to mischaracterizing the lower courts' determinations, the State also attacks a number of the trial court's factual findings. Both the "two-Court rule," see, e.g., Burger v. Kemp, 483 U.S. ___, ___, 97 L. Ed. 2d 638, 651 (1987); Goodman v. Lukens Steel Co., 482 U.S. ___, ___, 96 L. Ed. 2d 572, 584 (1987), and this Court's traditional reliance upon the district courts in school desegregation cases, see Columbus Bd. of Educ. v. Penick, 443 U.S. at 457 n.6, 464, id. at 468 (Burger, C.J., concurring in the judgment); id. at 469-71, 475-76 (Stewart, J. & Burger, C.J., concurring in the result), counsel against disturbing these findings.

In any event, the State's contentions are not convincing. The State charges the district court with making inconsistent findings in its August 25, 1986 and June 5, 1984 Orders (see Pet. at 17 n.21). In its earlier (1984) Order, while adjudicating the liability -- not the (continued...)

KCMSD's magnet school submission was its conclusion

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[18](...continued)
remedy -- portion of the case (see 593 F. Supp. at 1505, Pet. App. 240a), the district court had discussed "[p]art of plaintiffs' evidence of white flight to the suburbs consist[ing] of charts displaying the transfer of student records from various KCMSD high schools to surrounding districts over a 15-year period from 1958 to 1973." The court rejected plaintiffs' contentions that the evidence supported imposition of inter-district liability because "there is no evidence that the [suburban districts] enticed these families to move" and "the numbers involved are too insignificant to have had a segregative impact on the KCMSD or the [suburban districts]. White flight is simply not a constitutional violation by any [suburban district]." (June 5, 1984 Order, at 38-39.)

Then, in 1986 the trial court observed that it had

> found that segregated schools, a constitutional violation, has led to white flight from the KCMSD to suburban districts, large number of students leaving the schools of Kansas City and attending private schools and that it has caused a systemwide reduction in student achievement in the schools of KCMSD.

(August 25, 1986 Order, at 1-2.) These findings are not inconsistent, as the State suggests. In the 1984 Order, the district court did not find that there was no "white flight." Rather, it refused to impose inter-district liability on the basis of "white flight" because the suburban districts were overwhelmingly white in racial composition irrespective of the movement of white pupils who left the KCMSD (see, e.g., June 5, 1984 Order at 45, 49, 51, 55, 62, 67-70, 74-75, 79, 84-86, 91), and because the KCMSD schools remained highly segregated by virtue of that district's discriminatory practices during the 1958-73 time period, irrespective of its racial composition (see, e.g., Pet. App. 211a-215a; Pet. App. 209a-210a [discussing Davis v. East Baton Rouge Parish School Bd., 721 F.2d 1425 (5th Cir. 1983)(rejecting similar argument that demographic change was responsible for school segregation)]).

that this magnet plan was both most likely to be successful in achieving actual desegregation and also most equitable for black students in the district, not any sort of desire to attain a specific racial balance in the district's schools.[19]

B. The district court's goal of achieving comparability between KCMSD's facilities and programs with the average of those of surrounding systems was a reasonable starting point in the formulation of a remedy to eliminate the effects of the proven constitutional violations.

The State attacks the remedial orders in this action that require capital improvements within the KCMSD,

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[19]Indeed, as the State itself points out (Pet. at 18 n.22), neither the district court nor the Court of Appeals has imposed any requirement that some minimum number of white students from outside the KCMSD boundaries enroll in the magnet schools. The lower courts' failure to do so fatally undercuts the State's contention that the magnet school plan was approved for the purpose of satisfying some judicially created "duty to attract additional non-minority students to a school district" so as to change the KCMSD into a district "with some particular number of white and black students" (Pet. at 15).

contending that the district court has read into the "equal protection clause [a] require[ment] that a school district . . . once-segregated [must be made] comparable to neighboring districts" (Pet. at 13).[20] This contention is

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[20]The State has failed to raise this issue in a timely fashion before this Court. On June 14, 1985, the district court directed that KCMSD make capital improvements more extensive than those which the State of Missouri had argued were appropriate in light of the violation, specifically indicating that

> [a]fter the submission of the $37,000,000 improvement plan, KCMSD shall then review other capital improvements needed in order to bring its facilities to a point comparable with the facilities in neighboring suburban school districts.

(639 F. Supp. at 41, Pet. App. 191a.) The State appealed from this capital improvements order, making the same arguments it now raises in its Petition (compare, e.g., 807 F.2d at 685 with Pet. at 7 and 639 F. Supp. at 40-41, Pet. App. 189a-190a). The Eighth Circuit, en banc, affirmed the scope of the plan while modifying the allocation of financial responsibility between the KCMSD and the State, 807 F.2d at 685-86. The State chose not to seek review of that ruling by this Court.

Since that time, additional renovations, improvements and construction have been ordered, undertaken and/or completed, subject to the equal allocation of costs directed by the Court of Appeals in 1986. The additional, avoidable and wholly unexpected financial burden which would be shifted from the State to some other party -- in all likelihood to the KCMSD and its taxpayers, including the black parents and children who are the victims of the long-continued constitutional violations in this case -- if the capital improvements orders were now overturned, provides a compelling (continued...)

similar to the argument advanced by the defendants in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 23-25 (1971), that because the student assignment plan there was drawn with an awareness of the overall proportion of minority pupils in the system, it embodied a substantive right to a particular racial balance. In Swann, this Court rejected the argument, because the system-wide proportion had been employed as a starting point to help determine whether the plan would "achieve the greatest possible degree of desegregation, taking into account the practicalities of the situation," Davis v. Board of School Commissioners, 402 U.S. 33, 37 (1971).[21] Here, it is similarly clear that

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[20](...continued)
reason why the State's contentions that could have been raised in 1986 became the law of the case at that time and ought not be entertained by this Court now.

[21]See also, e.g., Hutto v. Finney, 437 U.S. at 685-86 & n.8.

the standard of comparability to suburban facilities was employed by the district court as an operational guide, not a substantive goal.

When the district court concluded the liability phase of this case and turned its attention to the formulation of an adequate remedy, it was confronted with a school system in which the adverse effects of racial discrimination and segregation were still very much in evidence: "a system wide reduction in student achievement" (639 F. Supp. at 24, Pet. App. 155a); a school district which, alone among systems in the Kansas City metropolitan area, lacked the state "AAA rating [that] is a designation which communicates to the public that a school system quantitatively and qualitatively has the resources necessary to provide minimum basic education to its students" (639 F. Supp. at 26, Pet. App.

159a); an "educational process [that] has been further 'bogged down' in the KCMSD by a history of segregated education" (639 F. Supp. at 28, Pet. App. 164a);[22] and school facilities whose "current condition . . . adversely affects the learning environment . . . [because of] safety and health hazards, educational environment impairments, functional impairments, and appearance impairments" (639 F. Supp. at 39, Pet. App. 187a).[23] Accordingly, the court sought to devise a remedy that would eliminate the continuing impact of the violation.

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[22]The court commented that while "[a]ll, regardless of race or class or economic status, are entitled to a fair chance and to the tools for developing their individual powers of mind and spirit to the utmost, . . . [s]egregation in the KCMSD has resulted in this promise going unkept" (639 F. Supp. at 24; Pet. App. 154a).

[23]In a later order, the district court characterized the KCMSD school plant as having "literally rotted," 672 F.2d at 211, Pet. App. 86a.

For example, the court was persuaded by "[t]he testimony of all the educational experts [for all parties that] . . . the schools in KCMSD, when provided with adequate resources, sufficient staff development, and proper teaching methods, can attain educational achievement results more in keeping with the national norms" (639 F. Supp. at 24, Pet. App. 156a). With substantial agreement from the State of Missouri,[24] the court therefore required implementation of a wide variety of innovative, supportive, and training programs to restore the educational climate within the KCMSD. To effectuate these aspects of the remedy, the court

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[24]See, e.g., 639 F. Supp. at 25, Pet. App. 156a ("both the State of Missouri and the KCMSD have proposed program components designed to increase student achievement at the elementary and secondary levels"); 639 F. Supp. at 26, Pet. App. 158a ("both the State of Missouri and the KCMSD endorse achieving AAA status, reducing class size at the elementary and secondary level, summer school, full day kindergarten, before and after school tutoring and early childhood development programs").

determined, on the basis of overwhelming evidence placed before it, that substantial improvement of KCMSD's school buildings would be necessary:

> The improvement of school facilities is an important factor in the overall success of this desegregation plan. Specifically, a school facility which presents safety and health hazards to its students and faculty serves both as an obstacle to education as well as to maintaining and attracting non-minority enrollment. Further, conditions which impede the creation of a good learning climate, such as heating deficiencies and leaking roofs, reduce the effectiveness of the quality education components contained in this plan.

(639 F. Supp. at 40, Pet. App. 188a.)[25] The district court has continued, throughout the subsequent course of this litigation, to focus on capital needs that are directly related to eliminating the continuing effects of the violations and to the educational components of the plan (e.g., 672 F. Supp. at 404, Pet. App. 70a-71a).

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[25] See also 639 F. Supp. at 41, Pet. App. 190a.

As we have previously noted, the trial court determined to institute magnet school options and to solicit the participation of suburban school districts in a voluntary inter-district transfer program to expand the possibilities for achieving further desegregation of the KCMSD (639 F. Supp. at 34-35, 38-39, Pet. App. 176a-177a, 185a-187a). The court found that the successful implementation of integrated magnet schools demanded adequate plant, facilities and equipment.[26] Thus, in its initial remedial decree, the district court ordered KCMSD to submit a first-year budget for its existing magnet schools, to include "budget items which are directly related to enhancing the full desegregative drawing power of these schools" (639 F. Supp. at 34,

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[26]As the district court stated, "[t]he magnet school plan is crucial to the success of the Court's total desegregation plan and the KCMSD cannot effectively implement the magnet programs without special facilities" (672 F. Supp. at 406, Pet. App. 75a).

Pet. App. 177a), and the court thereafter approved both operating and capital expenditures for the magnets (639 F. Supp. at 53, 54-55, Pet. App. 144a, 146a-148a). In the 1987 Order on which the State focuses, the trial court rejected the State's capital program submissions in part because "the State failed to estimate the cost necessary to provide magnet facilities needed to implement the long-range magnet school plan approved by the Court on November 12, 1986" (672 F. Supp. at 404, Pet. App. 71a).

Because the capital improvements are tied to effective implementation of the magnet schools and the educational components of the desegregation plan, the Petition is misleading in intimating that everything which the district court ordered in September, 1987 "was

expressly designed to make KCMSD schools comparable to suburban schools" (Pet. at 7-8).

In many of the areas given remedial attention, performance standards that would assure that the effects of the violation would be eliminated were readily ascertainable. For instance, the Missouri State Department of Elementary and Secondary Education awards ratings (such as the AAA rating) to school districts on the basis of annual evaluations and had established and documented KCMSD's deficiencies and needs (see 639 F. Supp. at 26-28, Pet. App. 158a-163a). With respect to reductions in class size, the court accepted goals suggested by the KCMSD that were less stringent and less costly than the recommendations made

by the Missouri State Board of Education (see 639 F. Supp. at 28-30, Pet. App. 163a-168a).

As to capital improvements, the district court articulated a set of standards that were closely related both to the violations it had found and the other remedial components it was ordering. First, the court required "eliminating safety and health hazards" and "correcting those conditions existing in the KCMSD school facilities which impede the level of comfort needed for the creation of a good learning climate" (639 F. Supp. at 41, Pet. App. 191a). These goals were directly responsive to the discrimination in the KCMSD under the dual system.[27] Second, the court recognized

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[27]The State does not dispute the historically inferior quality of black schools under the dual system in the KCMSD, which is in any event established on this record. See, e.g., Tr. 818-24, 1,743-46, 16,835. Nor did the State demonstrate -- and the district court did not make any finding -- that the inadequacies attributable to the dual system had been redressed prior to the time that a deferred (continued...)

that the voluntary enrollment of white students in KCMSD magnet schools would not be possible if those schools continued to be perceived as inferior to

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[27](...continued)
maintenance program at all schools was made necessary by voter refusal to approve bond issues for capital improvements, 639 F. Supp. at 39, Pet. App. 187a. Thus, the capital improvements ordered by the trial court in part correct pre-Brown inequalities that were perpetuated and exacerbated within the KCMSD by the district's and the State's failure to meet their affirmative obligations to eliminate the vestiges of enforced segregation. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 18 ("the first remedial responsibility of school authorities is to eliminate invidious racial distinctions. . . . Similar corrective action must be taken with regard to the maintenance of buildings and the distribution of equipment").

Capital improvements have been routinely ordered as appropriate components of remedial decrees in desegregation cases. See, e.g., United States v. Yonkers Bd. of Educ., 856 F.2d 7 (2d Cir. 1988); Liddell v. Board of Educ., 801 F.2d 278 (8th Cir. 1986); Plaquemines Parish School Bd. v. United States, 415 F.2d 817, 831 (5th Cir. 1969); United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 393-94 (5th Cir.)(en banc), cert. denied sub nom. Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967); Morgan v. Nucci, 617 F. Supp. 1316, 1318 (D. Mass. 1985), appeal dismissed, 831 F.2d 313 (1st Cir. 1988); Hoots v. Pennsylvania, 539 F. Supp. 335, 338 (W.D. Pa. 1982), aff'd, 703 F.2d 722 (3d Cir. 1983); Tasby v. Estes, 412 F. Supp. 1192, 1219 (N.D. Tex. 1976), remanded on other grounds, 572 F.2d 1010 (5th Cir. 1978); Singleton v. Anson County Bd. of Educ., 283 F. Supp. 895, 903 (W.D.N.C. 1968); Redman v. Terrebone Parish School Bd., 293 F. Supp. 376, 379 (E.D. La. 1967).

alternative educational opportunities available to these students.[28] For this reason, the court required that renovation and construction plans also take into account "improving [KCMSD's] facilities to make them visually attractive" and "comparable with the facilities in neighboring suburban school districts" (639 F. Supp. at 41, Pet. App. 191a). This goal was not, however, devised by the trial court to obliterate "[d]ifferences in local school funding" or to transform "a 'system of school financing [which] results in unequal expenditures between children who happen to reside in different districts . . .'" (Pet. at 19-20, quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 54-55 (1973)). Rather, it represents the starting point in designing a remedy for

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[28]Cf. 639 F. Supp. at 26, Pet. App. 159a (KCMSD only district in metropolitan area not rated "AAA").

the constitutional violations that is adequate and workable:

> The long term goal of this Court's remedial order is to make available to all KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district. In achieving this goal the victims of unconstitutional segregation will be restored to the position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment.

(639 F. Supp. at 54, Pet. App. 145a-146a [emphasis in original deleted and emphasis added].) Simply put, the standard of general comparability to the average school system in the geographic area was utilized as a practical mechanism for identifying the educational opportunities and facilities that were denied to KCMSD's black students as a result of the practices of racial segregation and discrimination,[29] and for assuring the likely success

[29]"[T]he Court has the responsibility of providing the victims of (continued...)

of the magnet options.[30]

Petitioners strain to fashion some legal issue worthy of review by claiming that there was no "state action" which justifies the capital improvements orders because, as the State argued unsuccessfully to the trial court, "'the present condition of the district school facilities is not traceable to unlawful segregation but is due to a lack of maintenance by the KCMSD'" (Pet. at 7) and, it asserts, "[t]here is no conceivable way that a KCMSD resident, entering a voting booth to support or oppose a tax

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[29](...continued)
unlawful segregation with the educational facilities that they have been unconstitutionally denied. Therefore, a long-range capital improvement plan aimed at eliminating the substandard conditions present in KCMSD schools is properly a desegregation expense and is crucial to the overall success of the desegregation plan" (672 F. Supp. at 403, Pet. App. 69a).

[30]"In conclusion, if the KCMSD schools underwent the limited renovation proposed by the State, the schools would continue to be unattractive and substandard, and would certainly serve as a deterrent to parents considering enrolling their children in KCMSD schools" (672 F. Supp. at 405, Pet. App. 72a).

increase, can 'fairly be said to be a state actor'" (Pet. at 20).

These contentions do not justify granting the writ. In the first place, as the Court of Appeals held,

> this argument advanced by the State attacks an aspect of the court's findings that was merely an alternative basis for its conclusion. . . . Even absent the findings that the State contributed to causing the decay, the capital improvements would still be required both to improve the education available to the victims of segregation as well as to attract whites to the schools.

(855 F.2d at 1305, Pet. App. 18a.) The issue fashioned by the State thus will not be reached even if review were granted.[31] Moreover, the trial court found that the

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[31]Similarly, the Petition refers to

> the court of appeals' attempt to match voting patterns with the existence of "segregation"--by pointing out that voting support fell off when the district enrollment became majority black (Pet. App. 18a n.7) . . . .

(Pet. at 20). But the Court of Appeals, in the footnote cited by Petitioners, explicitly noted that while "[t]he record tends to support these arguments . . . the district court did not base its findings of

(continued...)

racially discriminatory policies carried out in the KCMSD after Brown "contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools" (Pet. App. 124a),[32] and the Court of Appeals affirmed (855 F.2d at 1305, Pet. App. 17a-18a). Review of findings concurred in by both courts below is inappropriate under the "two-court" rule, see supra note 18.[33]

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[31](...continued)
fact and conclusions of liability on this theory, [and] we need say no more." The judgments below therefore do not rest, in any part, upon the facts described in the footnote cited by Petitioners.

[32]Cf., e.g., Reitman v. Mulkey, 387 U.S. 369, 373, 376 (1967)(examination of voter initiative "in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment'" revealed that "intent . . . was to authorize private racial discriminations in the housing market . . . and to create a constitutional right to discriminate on racial grounds").

[33]If the State's arguments were to be considered on their merits, they are clearly lacking in substance. KCMSD's electorate is simply not a mass of individual private citizens when it exercises the power conferred upon it by Missouri school law to determine the level of capital expenditure in a district; its decisions in such matters are as much state action as the electoral initiatives involved
(continued...)

II

The District Court's Order Directing The Collection, For A Limited Period Of Time, Of Additional Property Tax Revenues Within The KCMSD Adequate To Support The District's Share Of The Remedial Costs Is An Appropriate Exercise Of Its Equitable Remedial Authority To Effectuate The Fourteenth Amendment To The Constitution

The discussion in the preceding section demonstrates that the measures ordered by the district court are necessary and appropriate to provide a complete remedy for the unconstitutional and discriminatory actions of KCMSD and Missouri officials, and that no issue justifying review by this Court with respect to the goals of those remedies is raised by Petitioners. There remain

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[33](...continued)
in Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), Hunter v. Erickson, 393 U.S. 385 (1969), and Reitman v. Mulkey. The district court's orders were not directed to persons who acted as private parties, such as the "charitable and civic groups" which declined or were unable to assist KCMSD in raising funds for capital improvements (see August 25, 1986 Order at 3).

for consideration Petitioners' contentions that the trial judge so far departed from the appropriate exercise of his equitable authority in directing the collection of additional property taxes within the KCMSD as to warrant scrutiny by this Court. Contrary to Petitioners' plaintive assertions, we believe that the power of a federal district court -- in fashioning relief adequate to redress Fourteenth Amendment violations -- to require local officials to increase tax collection when all other means of assuring implementation of the remedy have been exhausted, is unquestionable; and that the appropriateness of its exercise in this instance is established by the decisions of this Court.

A. The authority of federal courts in school desegregation suits to require local tax levy and collection in order to effectuate relief necessary to vindicate Fourteenth Amendment rights was settled in Griffin and this case fits squarely under that ruling.

Preliminarily, we emphasize that this question is presented in the context of admitted, protracted, substantial violations of the Equal Protection Clause of the Fourteenth Amendment which the district court found to have caused substantial, continuing harm to the education of black children in the KCMSD; and in the context of that court's having determined what is the necessary and appropriate remedy to eliminate the continuing effects of the violations. It is totally wrong to say, as the State of Missouri does (Pet. at 27), that neither of the courts below "made any serious inquiry into whether the KCMSD might become unitary without a mandatory tax increase." The district court carefully

shaped the remedy to be responsive to the nature and scope of the violation and rejected the parties' submissions that it viewed as going beyond this parameter.[34] Its conclusion, which was affirmed by the court below, was that the remedies it was ordering were necessary to accomplish the operation of the KCMSD schools free from racial discrimination and its effects.[35]

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[34]See supra note 5 and accompanying text; Pet. App. 96a-97a (disapproving requested funding increase for test updates that would be required even in absence of desegregation plan).

[35]In contrast, the State of Missouri appears to argue that the district court should have curtailed the remedy -- in other words, rendered it less than fully adequate -- to avoid the possibility that if state law inhibitions on KCMSD's ability to raise funds were not modified by the state legislature (as they were not), the court might be required to order an increase in the tax levy. (See State Pet. at 27.) The suggestion carries deference to the point of submission and would inevitably reward recalcitrance.

The cases on which the State seeks to rely are inapposite. For example, in New York State Association for Retarded Children v. Carey, 631 F.2d 162, 165 (2d Cir. 1980), cited in State Pet. at 27 n.34, an alternative to requiring increased state funding -- "clos[ing] the institution" -- was available because that remedy would have relieved the plaintiffs from suffering the unconstitutional conditions of confinement, see id. at 166 n.1 (Kearse, J., concurring). See also Rhem v. Malcolm, 507 F.2d 333, 341 & n.19 (2d Cir. 1974)(closing (continued...)

Under these circumstances, the court's authority to impose additional property tax obligations within the KCMSD in order to secure effectuation of the remedy is, we suggest, unquestionable. In Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964), the public schools of one county within a state had been closed to avoid the requirements of the

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[35](...continued)
institution had "crucial practical advantage . . . of not putting the judge in the difficult position of trying to enforce a direct order to the City to raise and allocate large sums of money" but in "a situation where the unconstitutionally-administered governmental function must be kept operating in any event . . . , a court might have no choice but to order an expensive, burdensome or administratively inconvenient remedy"); Reece v. Gragg, 650 F. Supp. 1297, 1307-11 (D. Kan. 1986)(setting jail population ceilings as condition for staying injunction against continued operation of facility pending submission and implementation of plan to correct unconstitutional conditions), cited in Clark Pet. at 22 n.6.

Such an approach is not feasible in a school desegregation action. Enjoining the operation of the KCMSD schools until the remedy were implemented would cause further harm to the victims of the constitutional violations. Enjoining all public schooling in the KCMSD suburbs, or throughout Missouri, until the plan were funded, would similarly penalize the victims of segregation as well as be a gross departure from equitable principles.

Fourteenth Amendment as interpreted by this Court in Brown, cutting off the opportunity for black pupils within the county to be educated. White pupils were assisted by county authorities to continue their schooling through a program of tuition grants for private school attendance and tax exemptions and credits. This Court held that the scheme violated the Fourteenth Amendment.

In its opinion, this Court explicitly outlined "the kind of decree necessary and appropriate to put an end to the racial discrimination practiced against the[black children] under authority of the Virginia laws." Id. at 232. The district court had enjoined payment of the tuition grants or allowance of the tax exemptions so long as the public schools remained shut, and this Court had "no doubt of the power of the court to give this relief to enforce the discontinuance of the county's racially

discriminatory practices," id. at 232-33. But this Court went further to describe the broad affirmative, remedial authority of the trial courts in desegregation cases:

> The injunction against paying tuition grants and giving tax credits while public schools remain closed is appropriate and necessary since those grants and tax credits have been essential parts of the county's program, successful thus far, to deprive petitioners of the same advantages of a public school education enjoyed by children in every other part of Virginia. For the same reasons the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia.

(Id. at 233 [footnote omitted and emphasis added].) The district court had stated it would consider (but had not yet issued) an order to accomplish the reopening of the schools. This Court remanded with instructions to enter the sort of decree it had described:

> An order of this kind is within the court's power if required to assure these petitioners that their constitutional rights will no longer be denied them. The time for mere "deliberate speed" has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in other parts of Virginia.
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> . . . [T]he cause is remanded to the District Court with directions to enter a decree which will guarantee that these petitioners will get the kind of education that is given in the State's public schools. And, if it becomes necessary to add new parties to accomplish this end, the District Court is free to do so.

(Id. at 233-34 [emphasis added].)[36]

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[36]Because the Court remanded with instructions to enter such a decree, Petitioners err fundamentally in trying to discount the importance of the Court's opinion because "the Court did not itself order a tax levy increase" (Clark Pet. at 18; see Jackson County Pet. at 10) or "no tax was actually before the Court in Griffin" (State Pet. at 24). The direction to add parties, if required, unquestionably refers to the County Board of Supervisors, and the necessity of joining them as parties quite evidently refers to the task of assuring funding adequate to "guarantee" that black students in the county would receive "the kind of education that is given in the state's public schools" "without racial discrimination."

(continued...)

The trial court here has faithfully applied the precepts of Griffin. It first considered and approved a remedy adequate to assure the operation of the KCMSD schools without racial discrimination. It carefully determined what resources would be required to implement that remedy and allocated the costs between the joint tortfeasors, the State of Missouri and KCMSD. It required the KCMSD to attempt through every means at its disposal to raise its share of the necessary funding, including by seeking voter approval for additional tax levies on four occasions in 1986 and 1987.[37] To meet KCMSD's fiscal obligations in the early stages of plan

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[36](...continued)

As is evident from the passages quoted in the text, Missouri also is wrong in suggesting that the Court's discussion in Griffin "was limited to a single conclusory statement" (id.).

[37]See 672 F. Supp. at 411, Pet. App. 85a-86a (summarizing attempts by KCMSD to raise funds as well as failure of Missouri legislature to provide new mechanism for this purpose); Pet. App. 127a (suggesting General Assembly of Missouri take such action).

implementation, the court suspended the operation of a state-law property tax rollback provision on two occasions, effectively raising property tax levies within the KCMSD higher than they would have been except for its order.[38] Only after all of these avenues were exhausted and it was clear that absent additional relief from the court the plan could not be fully effectuated, did the district court determine to order an increase in KCMSD's property tax levy. The court's orders require a total levy rate less than the highest rate that had been

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[38]Significantly, the State of Missouri did not appeal the first order, see 807 F.2d at 682-86 (addressing State's arguments on appeal), or seek review in this Court, even after the Court of Appeals in 1986 suggested that the district court could raise the tax levy if necessary to fund the increased share of desegregation costs which it was placing on the KCMSD, see id. at 686, citing Liddell v. Missouri, 731 F.2d at 1319-23. When the rollback was enjoined for the second time, "[t]he State urge[d] that KCMSD be required to pay its share of desegregation costs; it t[ook] no position as to the method through which KCMSD obtains the funds to meet its burden," August 25, 1986 Order at 1.

Neither of the other Petitioners sought intervention on a timely basis following these tax rollback suspensions.

in effect in the KCMSD in the period from 1974 to 1982[39] and provided that the additional levy shall continue only until 1991-92, or until bonds to finance necessary capital improvements have been retired.[40]

It is suggested that Griffin does not support this action because this Court's opinion did not explicitly refer to an increased tax rate (Clark Pet. at 18; Jackson County Pet. at 10). Griffin will not bear such a crabbed reading. This Court could not have intended to deny the district court authority to require the Board of Supervisors to levy and collect a tax "adequate to reopen, operate, and maintain without racial

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[39]See 855 F.2d at 1312, Pet. App. 32a.

[40]672 F. Supp. at 413, Pet. App. 89a; Pet. App. 63a. In view of its reversal of the income tax surcharge, the Court of Appeals directed that the district court reevaluate the need for continuation of the increased property tax levy at the end of the 1991-92 school year, 855 F.2d at 1315, Pet. App. 38a.

discrimination a public school system in Prince Edward County like that operated in other counties in Virginia," 377 U.S. at 233 (emphasis added). The remand directions necessarily meant not only that the district court could require the Board of Supervisors to levy some tax, however small, but that the district court could order it to levy a tax adequate to provide "a public school system in Prince Edward County like that operated in other counties in Virginia."[41] Similarly, if the county's school facilities had fallen into disrepair during the period of their closure and needed to be

[41]Indeed, on remand, the Board of Supervisors initially declined to appropriate any funds, and the district court ordered it to make available "such 'County funds as are reasonably necessary for the opening and maintenance of the public schools * * * on a non-discriminatory basis.'" Plaintiffs then challenged the adequacy of the appropriation; the court entertained this inquiry but "postponed action until subsequent experience should reveal its adequacy or inadequacy." See Griffin v. Board of Supervisors of Prince Edward County, 339 F.2d 486, 489, 490 (4th Cir. 1964)(describing lower court proceedings).

rehabilitated in order to be "reopen[ed]" and made "like [other school facilities] operated in other counties in Virginia," we are confident that the Griffin remand directions encompassed the district court's authority to require adequate funding to accomplish these ends.

The actions of the trial court in the instant matter fall squarely within the ruling in Griffin and Petitioners have advanced no compelling reason why Griffin should be reconsidered; thus, denial of the writ is appropriate.[42]

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[42]We also agree with the Court of Appeals (855 F.2d at 1311-13, Pet. App. 31a-36a) that the district court's actions may be characterized and sustained as directing the disregard of the state law limitation on KCMSD's tax levy rate in order to accomplish vindication of Fourteenth Amendment rights, North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971); see Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 694-96, modified on other grounds sub nom. Washington v. United States, 444 U.S. 816 (1979).

B. Apart from Griffin, the power of federal courts, in appropriate circumstances, to order state tax levies to be made is not in doubt.

Petitioners, in reliance upon a congeries of decisions from this Court, vehemently contend that federal courts may never direct state or local officials to levy or collect a tax,[43] or may do so only if there is explicit state legislative authorization.[44] This argument rests upon a

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[43] E.g., State Pet. at 22 ("There are serious grounds for doubting that federal courts have any power to order specific taxes"); Clark Pet. at 22 (opinion below "is devoid of any . . . support [for] the premise that the federal judiciary is expressly empowered under Article III to impose taxes to generate revenues to fund court-ordered remedies"); Jackson County Pet. at 11-12 ("A court has many powers, up to but not including the power to order increases in taxation, which may be used to remedy segregation").

[44] E.g., State Pet. at 24 n.31 ("cases allo[w] the use of mandamus to order collection of authorized taxes"). The State's argument on this score appears to rest upon language which it attributes to this Court in United States ex rel. Ranger v. New Orleans, 98 U.S. 381 (1879). Id. However, the language quoted in the Petition is taken from the argument of counsel in that case, which was rejected by this Court; the decision in fact announces the contrary proposition.

In that case the City of New Orleans argued that because the 1854 statute authorizing the city to issue bonds included no explicit provision for a tax levy to pay the principal amounts, judgments in (continued...)

fundamental misreading of the jurisprudence in municipal bond default cases decided by this Court during the last century,[45] and is based upon language in the opinions in some of those cases that is uprooted

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[44](...continued)
favor of the bondholders for those amounts could not be enforced by issuance of a mandamus to levy a tax in order to pay the judgments. 98 U.S. at 390-91. This Court held that authorization of the borrowing "implies and carries with it the power to adopt the ordinary means employed by such bodies to raise funds for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation." Id. at 393. The Court reversed "with directions to issue the writ [of mandamus] as prayed in the petition of the relator," id. at 397.

In United States ex rel. Wolff v. New Orleans, 103 U.S. 358 (1881), this Court applied the same principle, directing the issuance of a writ to levy taxes without regard to a state statute limiting the total annual levy which could be made.

[45]Some of Petitioners' citations are flatly wrong. See supra note 44. Others have nothing to do with the questions at issue here. For instance, Stansbury v. United States, 75 U.S. 33 (1869), cited in State Pet. at 25 n.31, holds that the Secretary of the Interior could not create an obligation binding upon the United States in the absence of legislative authorization. Imbler v. Pachtman, 424 U.S. 409 (1976), cited in State Pet. at 23, recognized an immunity from suit under 42 U.S.C. § 1983 as a matter of statutory construction, not judicial power.

from its context and consequently given an incorrect interpretation.

In the case at bar, the district court on September 15, 1987 entered an order increasing the property tax levy for the KCMSD to $4.00 per $100 of assessed valuation (672 F. Supp. at 413, Pet. App. 90a). Subsequently, the court granted injunctive relief requiring Jackson County officials to collect the additional tax.[46] This was the modern-day equivalent of issuing a writ of mandamus to the local officials requiring them to levy and collect the additional tax.[47] The authority of federal

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[46]On September 29, 1987, the district court issued a Temporary Restraining Order to this effect. Following a hearing, the court continued the order in the form of a preliminary injunction issued October 17, 1987 and made it permanent on January 7, 1988 (Jackson County Pet. App. 111; see 855 F.2d at 1315, State Pet. App. 39a).

[47]The writ of mandamus in the district courts was abolished in 1937 when law and equity jurisdiction was merged and the Federal Rules of Civil Procedure adopted. Fed. R. Civ. P. 81(b). Relief in the nature of mandamus, however, continues to be available and (continued...)

courts to grant this relief has never been doubted.

In Rees v. City of Watertown, 86 U.S. 107 (1874) and Meriwether v. Garrett, 102 U.S. 472 (1880), upon which Petitioners rely so heavily, this Court reiterated its view that writs of mandamus could be issued against state officers requiring them to levy and collect taxes in order to satisfy federal court judgments against them. See Rees, 86 U.S. at 117 ("The appropriate remedy of the plaintiff was, and is, a writ of mandamus); Meriwether, 102 U.S. at 520 ("The taxes levied pursuant to writs of mandamus issued by the circuit court are still to be collected, the agency only for their collection being

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[47](...continued)
"[t]he principles that governed the former writ now govern attempts to secure similar relief," Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 n.7 (D.C. Cir. 1985)(Scalia, J.). See, e.g., Couch v. City of Villa Rica, 203 F. supp. 897 (N.D. Ga. 1962)(ordering city to increase rates charged by municipally owned utility to satisfy federal court negligence judgment).

changed. The Receiver appointed by the Governor has taken the place of the collecting officers of the city. . . . The Receiver, and any other agent of the State for the collection, can be compelled by the court, equally as the former collecting officers of the city, to proceed with the collection of such taxes").[48]

What this Court refused to approve in Rees and Meriwether, and what it described as being beyond the power of the federal judiciary, was not an order requiring state officials to levy and collect a tax, but rather the designation of the United States Marshal to seize taxable property of private citizens and sell it to satisfy a judgment, see Rees, 86 U.S. at 119, or the

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[48]Graham v. Folsom, 200 U.S. 248, 249 (1906) followed Meriwether in upholding "the judgment of the circuit court in mandamus, requiring [successor public officials following a governmental restructuring] to assess and collect taxes to pay a judgment."

direct appointment of a federal receiver to collect all state taxes and pay the judgment, see Meriwether, 102 U.S. at 508.[49] That is not what was ordered below.

The other decisions to which Petitioners advert are equally distinguishable.[50] It is true that in suits founded

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[49]With characteristic brevity, Justice Holmes in Yost v. Dallas County, 236 U.S. 50, 57 (1915) summarized the operative principle as follows: "Of course it does not follow from the fact that a court has authority to issue a writ of mandamus to compel officers to perform their duty that it can perform that duty in their place."

[50]In Louisiana v. Jumel, 107 U.S. 711 (1883) the Court held that the Eleventh Amendment barred issuance of mandamus against the State -- not a municipality, cf. County of Lincoln v. Luning, 133 U.S. 529 (1890) -- in a suit that was not grounded upon the Fourteenth Amendment, see Milliken II, 433 U.S. at 288-90; cf. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

In Heine v. Levee Commissioners, 86 U.S. 655, 659-61 (1874), in addition to following Rees, the Court held that mandamus relief was unavailable until a federal court judgment had been obtained, to which relief the writ would be ancillary. This principle continues to govern the federal court award of relief in the nature of mandamus today. E.g., Brittingham v. Commissioner, 451 F.2d 315, 317 (5th Cir. 1971); Haggard v. Tennessee, 421 F.2d 1384, 1386 (6th Cir. 1970).

See also supra note 45.

solely upon state law claims, the availability of mandamus relief is subject to pre-existing state law limitations upon officials' taxing authority.[51] However, even in such state-law cases, federal courts will issue mandamus without regard to limitations on remedies adopted after a contract is formed, since these impair the obligation of contract in violation of the federal Constitution.[52] And where federal rights are at stake, as here, of course state-law limitations on remedy must give way. North Carolina State Bd. of Educ. v. Swann, 402

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[51]E.g., Clay County v. United States ex rel. McAleer, 115 U.S. 616 (1885)(contract claim); Louisiana ex rel. Ranger v. New Orleans, 102 U.S. 203 (1880)(contract claim; requirement that judgment be registered); United States v. County Court, 99 U.S. 582 (1879)(contract claim); United States v. County Court, 95 U.S. 769 (1878)(same); Couch v. City of Villa Rica, 203 F. Supp. at 901 (tort suit).

[52]E.g., Louisiana ex rel. Hubert v. Mayor of New Orleans, 215 U.S. 170 (1909); United States ex rel. Hoffman v. Quincy, 71 U.S. 535 (1867). Compare Louisiana ex rel. Ranger v. New Orleans, supra note 51 (subsequent requirement that judgment be registered held not to impair obligation of contract).

U.S. 43 (1971); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. at 694-96.[53]

We do not quarrel with the proposition advanced by Petitioners that federal courts should make every effort to avoid the necessity of ordering a tax increase. The district court in this action stayed its hand for as long as possible, until there was no other alternative to assure actual implementation of the remedy. See supra, text at nn. 37-38. When that unfortunate circumstance occurred as a result of the defendants' refusals to act, the court was fully justified in fashioning an appropriate decree.

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[53]See Yost v. Dallas County, 236 U.S. at 56, where Justice Holmes characterized the municipal bond cases as involving "obligation[s] under, not paramount to, the authority of the state," the United States Constitution in those suits "only requiring that the obligation of the contract should not be impaired by subsequent state law."

E.g., Hutto v. Finney, 437 U.S. at 687-88 & n.9. The writ should be denied.[54]

Conclusion

For the foregoing reasons, the writs should be denied.

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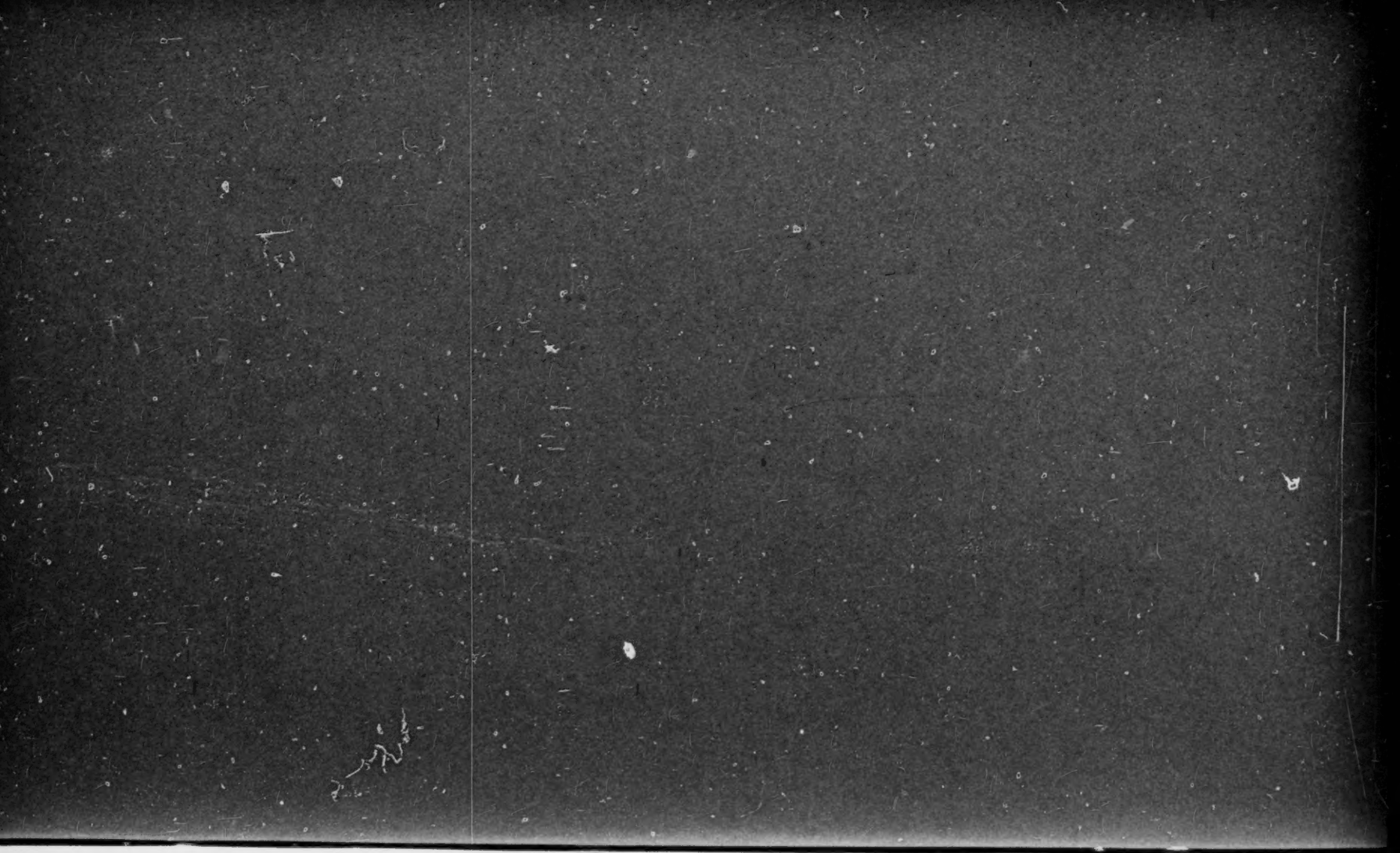
[54]We join with and adopt KCMSD Respondents' views as to the undesirability of granting review of the intervention questions raised in Nos. 88-1194 and -1228.



(4) (4) (3)

Nos. 88-1150, 88-1194, 88-1228

FILED
MAR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

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v.

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Respondents.

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JACKSON COUNTY, MISSOURI, *et al.*,
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Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT KANSAS CITY, MISSOURI SCHOOL DISTRICT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

48 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the petitions in these cases are all jurisdictionally out of time.

2. Whether the lower courts, faced with admitted racial segregation by the State and the local school district, and faced further with the failure by the State and the school district to remedy the effects of that segregation, acted well within their discretion to approve the use of magnet schools and capital improvements to place the District's educational system where it would have been but for the prior unconstitutional segregation.

3. Whether the lower courts, faced with a school district that lacked sufficient funds to remedy its past racial segregation and that had exhausted all other possibilities for obtaining those funds, had no choice but to enjoin State laws that prevented the District from raising the necessary funds through a property tax levy.

4. Whether the lower courts acted well within their discretion in denying motions to intervene where the motions were not timely, where intervention would unduly delay the remedy for the unconstitutional segregation, where the would-be intervenors had not overcome the presumption that their interests were adequately represented by the State, and where they were in any event permitted to participate in the proceedings through amicus briefs and at oral argument.

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT KANSAS CITY, MISSOURI SCHOOL DISTRICT

JURISDICTION

As shown in the Reasons for Denying the Writs, the Court does not have jurisdiction over the petitions[1] in

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[1] In this opposition, we cite the petition of the State of Missouri as "State Pet."; the petition of Jackson County as "Jackson Pet."; the petition of Icelean Clark as "Clark Pet."; the separate Appendix filed by the State as "App."; the Appendix attached to the State's petition as "Pet. App."; and the Appendix attached to this opposition as "Opp. App."

these cases because they were not filed within 90 days after entry of the Court of Appeals' judgment. 28 U.S.C. § 2101(c).

COUNTERSTATEMENT OF THE CASE

A. The Findings of Unconstitutional Segregation

This lawsuit was brought in 1977 by the Kansas City Missouri School District ("KCMSD") and a group of KCMSD school children, alleging that the State of Missouri had maintained unconstitutionally segregated schools in the District and had failed to eradicate the effects of that segregation. KCMSD was re-aligned as a party-defendant and beginning in October 1983 a 64-day trial commenced on both an interdistrict and intradistrict claim. On June 5, 1984, the district court (The Honorable Russell G. Clark) found that the alleged segregation had not caused any lingering interdistrict harm and so denied interdistrict relief. However, on September 17, 1984, Judge Clark found both the State and KCMSD liable for unconstitutionally segregating the schools of KCMSD and for failing in their affirmative duty to undo the harm of that segregation within KCMSD. App. 206a-13a, 235a-40a.

B. The Initial Remedial Order

After receiving proposed desegregation plans from the State and KCMSD and holding a two-week hearing on the appropriate methods for undoing the unconstitutional segregation, on June 15, 1985, Judge Clark made his key remedial determinations. First, he found that segregation had "caused a system wide *reduction* in student achievement in the schools of the KCMSD" (emphasis by the court), App. 155a, and noted that all parties (including the State) agreed that it was "appropriate to include a number of properly targeted educational programs in a desegregation plan." *Id.* (quoting State Plan at 5). He furthermore noted that both the State and KCMSD proposed programs "designed to increase student achievement" and that both specifically endorsed

programs that would achieve AAA status (as defined by the State Board of Education) for the KCMSD schools. App. 156a, 158a.

Next, Judge Clark addressed and approved the key components of the desegregation plan: magnet schools, capital improvements, and encouraging voluntary transfers of students to desegregate KCMSD schools. He noted that "accomplish[ing] desegregation" within a school district that had become nearly 70% black (after being only 22.5% black twenty-five years ago (App. 217a)) is a "difficult task" that could not be achieved without attracting non-minority students into the District, and that it could best be accomplished through magnet schools, achievement of AAA status, and improvement of the quality of KCMSD education. App. 185a. He specifically found that magnet schools "can be utilized to assist the State of Missouri and the KCMSD in expanding desegregative educational experiences" and in drawing non-minority enrollments, App. 176a, 177a, and he ordered the State to seek participation from surrounding school districts in a voluntary interdistrict transfer of students. App. 185a-86a.

Finally, Judge Clark found that the current state of the 68 KCMSD school facilities was so poor that it presented health and safety hazards, undermined the educational achievement components of the desegregation plan, perpetuated the inferior education that segregation had fostered, and discouraged the voluntary transfer of non-minority students. App. 187a-89a. He rejected the State's contention that the deteriorated condition of the schools had not been caused by segregation and, accordingly, ordered a capital-improvement program designed to correct those conditions. App. 189a-90a.

C. The Initial Appeal

On appeal to the Eighth Circuit, the State did not dispute Judge Clark's determination that the State and KCMSD had failed to remedy the effects of their unconstitutional segregation; neither did it appeal "sub-

stantial portion[s]" of the remedial order, including the implementation of programs designed "to achieve the AAA rating" in KCMSD. *Jenkins v. Missouri*, 807 F.2d 657, 682 (8th Cir. 1986) (*en banc*), *cert. denied*, 108 S. Ct. 70 (1987) ("*Jenkins I*"). Rather, the State challenged the court's authority to implement either a voluntary interdistrict transfer program or a capital-improvements program.

In response, the Court of Appeals rejected the State's contention that a voluntary interdistrict transfer program could not be implemented unless an interdistrict violation had been found.[2] The court also rejected the State's contention that the deterioration in the school buildings was in no part due to the prior segregation and that, therefore, no capital-improvements program could be required. *Id.* at 685. Instead, the *en banc* court concluded that the contrary "findings of the district court are sufficient to support its conclusion that capital improvements are necessary for successful desegregation." *Id.* at 685.

D. The Current Remedial Orders

The remedial orders now before this Court implemented the previously approved desegregation plan by: (1) determining the particular capital improvements and magnet schools still necessary to desegregate KCMSD; (2) allocating funding responsibility between KCMSD and the State; and (3) ensuring that KCMSD could pay its share of the necessary desegregation expenses. To determine the particular capital improvements and magnet schools needed, Judge Clark first found that "KCMSD

[2] Relying on precedents from this Court, other courts, and on its own holding and experience with the St. Louis desegregation plan, *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.) (*en banc*), *cert. denied*, 459 U.S. 877 (1982), the court determined that "a voluntary interdistrict program is one that has great potential for improving the racial balance in the Kansas City area" and that "[t]he experience in St. Louis with such a plan seems to have been favorable." 807 F.2d at 683 n.30.

facilities still have numerous health and safety hazards, educational environment hazards, functional impairments, and appearance impairments." App. 68a. Indeed, he found that KCMSD's "physical facilities have literally rotted" and that the "overall condition" of the schools remained "generally depressing and thus adversely affects the learning environment and continues to discourage parents who might otherwise enroll their children in the KCMSD." App. 68a, 71a-72a, 86a. To cure these conditions, Judge Clark approved only those specific programs and costs he found necessary to "eliminat[e] the substandard conditions present in KCMSD schools" and thereby "provid[e] the victims of unlawful segregation with the educational facilities that they have been unconstitutionally denied." App. 69a, 72a-79a.

To ensure that KCMSD could produce its share of the necessary desegregation costs,[3] Judge Clark first calculated the amount by which KCMSD's available revenue would fall short of its share. He next found that KCMSD had already exhausted *all* its available means of producing the necessary revenues, including its proposal of numerous bond issues and property tax increases, all of which had failed to pass.[4] In these circumstances, Judge

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[3] Judge Clark held the State and KCMSD ("the two constitutional violators") jointly and severally liable for the desegregation costs, but generally required the State to pay 75% of those costs and KCMSD 25%. (With regard to capital improvements, however, he made them equally liable for costs.) App. 79a, 81a-82a. He rejected the State's proposal for a 50%/50% allocation because: (1) the State was at greater fault for having mandated the unconstitutional segregation; (2) KCMSD's population is only 9% of the State's total and should not bear 50% of the costs; and (3) "even with Court help it would be very difficult for the KCMSD to fund more than 25% of the costs of the entire remedial plan." App. 111a-13a.

[4] Indeed, he noted that "KCMSD has not had a bond passage or a levy increase since 1969." App. 86a. He furthermore noted that the court itself had encouraged the Missouri General Assembly to enact legislation giving a district such as KCMSD additional means to meet its desegregation obligation, but that no legislation had

Clark concluded that he had no choice but to require local authorities to impose certain taxing measures to meet their constitutional obligation—even though the measures were in excess of the strict limits set by State law. Specifically, he authorized local officials to: (1) increase the District's property tax levy by $1.95, an amount necessary to fund KCMSD's share of desegregation costs through the 1991-92 school year (other than for capital improvements); (2) issue bonds in the amount of $150,000,000 to meet the capital-improvement requirements; and (3) apply a 1.5% income-tax surcharge to income generated in KCMSD (in order to retire the bonds). App. 88a-89a.[5]

E. The Eighth Circuit's Affirmance of the Current Remedial Orders

On appeal, the Eighth Circuit affirmed the capital-improvement and magnet-school orders, affirmed the cost allocation between the State and KCMSD, modified the procedures permitting local authorities to increase KCMSD's property tax, and reversed the income tax surcharge.

More specifically, the court approved the district court's findings that the deterioration both of educational quality and the physical facilities in KCMSD, as well as the racial imbalance in many of its schools, were all vestiges of the unconstitutional segregation. App. 11a-21a. It furthermore affirmed the district court's determination that the particular capital improvements and magnet schools at issue were reasonable and necessary steps toward the "long term goal" of restoring "*the victims of*

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been forthcoming; and that the State and KCMSD had been unable to agree on any alternative method for raising KCMSD's share of the desegregation costs. App. 84a-86a.

[5] In a subsequent order, Judge Clark provided that the property tax increase should be used to retire the bonds, and the surcharge to fund desegregation costs other than capital improvements. App. 63a-64a.

unconstitutional segregation . . . to the position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment." App. 10a (quoting district court at App. 146a) (emphasis added by Court of Appeals).[6]

The Eighth Circuit affirmed Judge Clark's authorization of an increased property tax levy on two alternative grounds. First, the court determined on the basis of this Court's decision in *Griffin v. County School Bd.*, 377 U.S. 218 (1964), as well as its own *en banc* decisions in *Liddell* and *United States v. Missouri*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975), that when all other alternatives had been exhausted the court could order local authorities to exercise their taxing power where absolutely necessary to remedy a constitutional violation. App. 28a-29a. Second, however, the Eighth Circuit determined that State laws had effectively prohibited KCMSD from imposing a property tax sufficient to meet its desegregation obligations and that Judge Clark's order should therefore be modified simply to enjoin those State laws. Specifically, as the court explained, in 1969 a majority of KCMSD voters approved an increase of the tax levy to $4.30, but Missouri law forbade the increase without a two-thirds majority, which had not been received. Thereafter, the voters by 63 percent approved an increase to $3.75, which passed because a two-thirds vote was not required. Subsequently, however, the levy was cut nearly in half to $2.05, not by KCMSD voters, but by operation of certain State-law tax changes and rollbacks. App. 32a-33a.

Accordingly, the Eighth Circuit reasoned, State law had "so narrowly circumscribe[d] KCMSD's ability to

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[6] Moreover, the court rejected the State's contention—the same one it had previously rejected in *Jenkins I* and *Liddell*—that efforts to induce voluntary interdistrict transfers may not be used to correct a racial imbalance caused by unconstitutional segregation. App. 11a. *See Jenkins I*, 807 F.2d at 683-84; *Liddell*, 731 F.2d at 1303.

raise money that, if forced to operate within these limits, the district court would lack power to implement a remedy." App. 34a. The court therefore directed KCMSD's elected Board to submit to county taxing officials the amount of the tax levy needed to meet its desegregation obligation (subject to a maximum figure to be set by Judge Clark), and authorized Judge Clark to enjoin those State-law provisions which prevented imposition of that levy. By thus affirming the order as one which simply "set aside levy limitations" on KCMSD's taxing authority, the Eighth Circuit relieved Judge Clark from the need either to determine the particular property tax that should be imposed or to order imposition of that tax. App. 39a-40a.

Finally, the Eighth Circuit reversed Judge Clark's income-tax surcharge order because it could not be construed as simply removing State-law limitations on local taxing authority. Rather, obtaining KCMSD revenue from that source required a "restructur[ing] [of] the State's scheme" and "an entirely new form of taxing authority." In imposing such a scheme, the court held, "the district court has exceeded its authority." App. 40a.

REASONS FOR DENYING THE WRITS

The Court should deny the petitions in these cases for three reasons. First, the petitions are jurisdictionally out of time and should be denied for that reason alone.

Second, the questions petitioners seek to have reviewed are either not raised by the cases at all or concern well-settled issues not meriting reconsideration. Thus, the State contends that this case calls into question the proper goals of a desegregation remedy when, in fact, the ultimate goal of every remedial order in this case was the goal repeatedly approved by this Court—removal of all vestiges of unconstitutional segregation in the school district. Moreover, the lower courts employed well-established desegregation tools in achieving that goal and acted well within their discretion in implementing those tools.

Likewise not presented by this case is the question of a federal court exercising taxing power. Rather, under the Court of Appeals' construction of the applicable State law and that court's modification of the district court's order, the lower courts have simply enjoined State law which prevents local officials from meeting their constitutional obligations. Moreover, even if the case were viewed as a judicial direction to the local authorities to exercise their taxing authority, it is well-settled that when no other alternative is available to remedy a constitutional violation, such a direction is authorized.[7]

Finally, the legal principles governing the KCMSD desegregation process—including every issue the State now seeks to have reviewed—have been addressed and finally resolved against the State in earlier Missouri desegregation cases or in earlier stages of this very case. Furthermore, as to each of the decided legal principles, certiorari was either sought and denied or was not sought at all. Now, when the desegregation remedy is in the third year of a five-year plan implementing ongoing capital-improvement and magnet-school programs in reliance on the settled legal principles, those principles should not be reconsidered. The desegregation process should, at long last, be permitted to proceed and cure the effects of unconstitutional segregation in KCMSD's schools.

I. This Court Lacks Jurisdiction to Entertain the Petitions

A party asking the Court to assume jurisdiction has the burden to establish that jurisdiction exists.[8] The present petitioners have not met that burden with regard to the timeliness of their petitions. Indeed, the record raises such serious doubts concerning timeliness that the petitions should be denied for that reason alone.

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[7] Also well-settled are the principles governing the denial of intervention to Jackson County and Clark. That denial was well within the lower courts' discretion, was in any case harmless, and in all events raises no question meriting review on certiorari.

[8] *E.g., Dep't of Mental Hygiene v. Kirchner*, 380 U.S. 194, 197 (1965) ("the party seeking review here must show that we have jurisdiction of the case" (footnote omitted)).

Congress has provided that "any writ of certiorari intended to bring any judgment . . . in a civil action . . . before the Supreme Court for review *shall* be taken or applied for within ninety days after the entry of such judgment . . . ." 28 U.S.C. § 2101(c) (emphasis supplied). Although the Court of Appeals' judgment in this case was entered on August 19, 1988, the first effort any party made to seek review of that judgment was on December 31 when petitioner Jackson County submitted an application for extension of time in which to file its petition. That application was returned by the Court because, as the Clerk noted in his January 3 letter to Jackson County, the 90-day statutory period in this case began to run on August 19 and had already expired. (The Clerk's letter is reprinted in the Appendix to this brief, Opp. App. 1a-2a.)

Although a timely petition for rehearing in the Eighth Circuit might have suspended the running of the 90-day period, no such petition was filed in this case.[9] Indeed, on October 14 the Court of Appeals entered an order expressly stating that *only* rehearing *en banc* petitions had been filed:[10] "There are three petitions for rehearing *en banc* pending before the Court. It is hereby ordered that all petitions for rehearing *en banc* are denied." App. 53a. In these circumstances, the Clerk of this Court was clearly correct in his January 3 deter-

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[9] As the Clerk of this Court stated in his January 3 letter: "Rule 35(c) of the Federal Rules of Appellate Procedure clearly states that the pendency of a petition for rehearing en banc shall not affect the finality of the judgment of the Court of Appeals." Opp. App. 1a. Therefore, as the Clerk also stated, "a petition for rehearing en banc does not toll the time for filing a petition for a writ of certiorari, only a petition for rehearing would toll the time. See Rule 40 of the Federal Rules of Appellate Procedure and Rule 20.4 of the Rules of the Supreme Court." *Id.*

[10] Copies of the petitions for rehearing *en banc* have been lodged with this Court by respondent Kalima Jenkins, *et al.*

mination that the time to petition this Court to review the August 19 judgment had long since expired.[11]

Nevertheless, petitioners seek to avoid the 90-day rule by relying on a January 10, 1989 order which the Eighth Circuit issued *after* the Clerk of this Court had determined that no petition could properly be filed. That January 10 order stated in full:

> This Court's mandate which was issued on October 14, 1988, is hereby recalled.
>
> There are three (3) petitions for rehearing with suggestions for rehearing en banc pending before the Court. *It is hereby ordered that the petitions for rehearing and the petitions for rehearing with suggestions for rehearing en banc are denied.*
>
> This order is entered *nunc pro tunc effective October 14, 1988.* The Court's mandate shall now issue forthwith. [Pet. App. A.1. (emphasis supplied).]

There is nothing in the record showing any submission by any party with regard to the January 10 Order, which

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[11] We are advised that, pursuant to Supreme Court Rule 20.3, the Clerk's office routinely returns petitions that incorrectly attempt to count the 90-day petitioning period from the date of a denial of a petition for rehearing *en banc.* Moreover, our research discloses that this Court often—*and without exception*—denies motions directing the Clerk to file petitions in such circumstances. *See, e.g., Poe v. United States* (motion denied May 16, 1988); *Farnum v. Comm'r of Patents and Trademarks* (motion denied Oct. 5, 1988). The reason for this well-settled practice is that the 90-day statutory requirement is *jurisdictional* and cannot be waived even by the Court itself. *E.g., Fed. Trade Comm'n v. Minneapolis-Honeywell Co.,* 344 U.S. 206, 207 (1952) ("The initial question in this case is one of jurisdiction—whether the petition for certiorari was filed within the period allowed by law," citing 28 U.S.C. § 2101(c)); *Dep't of Banking v. Pink,* 317 U.S. 264, 268 (1942) (petition for certiorari not filed within time provided by statute "must . . . be denied for want of jurisdiction"). Indeed, precisely because the rule is jurisdictional the Court has "strictly applied" it and has *never* granted a motion to file a petition sought to be filed in violation of the rule. *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 396 (6th ed. 1986).

appears to have been issued in an attempt to confer jurisdiction on this Court over the present petitions. It is submitted that the Court of Appeals' January 10 Order was ineffective to do so.

This Court long ago determined that its jurisdiction cannot be conferred by the device of *nunc pro tunc* orders declaring, *ipse dixit*, that the jurisdictional requirements have been met—when in fact they have not been met. *Credit Co. v. Arkansas Cent. Ry. Co.*, 128 U.S. 258, 261 (1888). As the Court there stated: "When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter." *Id.*[12] This fundamental principle controls the present cases. Once the time for petitioning this Court had expired—which it did 90 days after the August 19 judgment—no "simple order" of the Eighth Circuit could *nunc pro tunc* revive this Court's jurisdiction.[13] If it could, "the law which

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[12] *Accord, Wayne Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131, 137-38 (1937) (court of appeals may not entertain petition for rehearing merely for purpose of extending time for appeal to Supreme Court); *Conboy v. First Nat'l Bank*, 203 U.S. 141, 145 (1906) (once time to petition Supreme Court has expired, petition for rehearing in court of appeals cannot serve to "reinvest" this Court with jurisdiction).

[13] We do not mean to say that if a petition for rehearing had *in fact* been timely filed, the Eighth Circuit could not have recognized in an order denying rehearing that the time for petitioning this Court had thereby been tolled (*see* Supreme Court Rule 20.4). But that is not this case, and the Eighth Circuit's order did not state that it is. Rather, the Eighth Circuit has purported *nunc pro tunc* to deny petitions for rehearing that were *not* in fact filed. This the Eighth Circuit cannot do.

Neither is there any basis whatever for these petitioners to contend that their petitions were intended to be rehearing petitions. First, those petitions are all both in form and substance only *en banc* petitions. Second, both the Federal Rules of Appellate Procedure (Rules 35 and 40) and the Eighth Circuit's own local rules (Rules 15 and 16) clearly differentiate between the two different

limits the time within which an appeal can be taken would be a dead letter." *Id.*

II. These Cases are Controlled by Well-Settled Legal Principles that were Carefully Followed by the Lower Courts and that Do Not Merit this Court's Reconsideration

A. The Lower Courts' Orders were Plainly Designed to Meet the Central Remedial Goal Repeatedly Approved by this Court—Removal of the Vestiges of Unconstitutional Segregation

According to the State, the remedial orders in these cases "all raise a central question: What are the proper goals of a desegregation remedy?" State Pet. 14. The State contends that the goals were: (1) making the educational facilities in KCMSD comparable to those in adjacent suburban districts; and (2) attracting non-

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kinds of petitions. Third, the Clerk of the Eighth Circuit expressly brought those rules to the parties' attention in that court's August 19 letter announcing entry of the judgment. Opp. App. 3a. Finally, it is quite apparent that the parties to these proceedings know how to file a petition for rehearing when that is their intention. In the course of contesting desegregation orders in the Kansas City and St. Louis cases, the State of Missouri has variously filed petitions for rehearing, petitions for rehearing *en banc*, and petitions for both rehearing *and* rehearing *en banc*. By way of illustration, on February 10, 1988, the State filed with the Court of Appeals a "Motion For Rehearing En Banc" based upon, *inter alia*, the argument (p. 1) that "consideration by the full court is appropriate because of the exceptional importance of the questions involved." *Jenkins v. Missouri*, No. 87-2076WM. On December 6, 1985, the State filed with that court a "Petition For Rehearing," stating (p. 1) that the Eighth Circuit's decision reflected "either an oversight or misunderstanding of significant issues." *Liddell v. Missouri*, No. 85-1420EM. And on August 6, 1985, the State filed with the court a "Conditional Request . . . for Reconsideration or for Rehearing En Banc" contending that (p. 2) "if reconsideration or rehearing of any portion of the decision is deemed to be appropriate, consideration by the full court of the matters raised in this request is necessary to secure and maintain uniformity of decisions in this Court." *Liddell v. Missouri*, Nos. 85-1179-EM and 85-1220-EM.

minority students from the suburban districts to KCMSD. *Id.* at 14-15, 19. The State thereby implies that the present remedial orders were *not* designed to cure unconstitutional segregation, but to upgrade and achieve a better racial balance in KCMSD schools. The State therefore requests the Court to grant certiorari to decide whether such goals are legitimate.

The complete answer to this request is that the ultimate goals of the present desegregation remedy were *not* those described by the State at all. Rather, from the earliest district court order cited by the State (June 5, 1984) to the final judgment of the Eighth Circuit now at issue (August 19, 1988), both lower courts repeatedly and without exception acted with a single, overriding purpose: to cure the effects of the unconstitutional segregation in KCMSD. And both those courts served that purpose by closely adhering to the principles established by this Court.

Thus, in his June 5, 1984 Order, Judge Clark stated (at 97) that he was "compelled to follow the frequent admonition from the Supreme Court to tailor the remedy to fit the scope of the violation." In correcting the violation, he noted (in his Sept. 17, 1984 Order) that he had not only "the power but the duty to enter a decree which will correct the continuing effects of past discrimination as well as bar discrimination against blacks in the future." [14] At the same time, he recognized that "'[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.'" [15] Rather, he stated, "the goal of a desegregation decree is clear. The goal is the elimination of all vestiges of state imposed segregation." App. 153a.

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[14] App. 240a (citing *Louisiana v. United States*, 380 U.S. 145 (1965)).

[15] App. 182a (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 (1971)).

The most important vestiges Judge Clark found were "a system wide *reduction* in student achievement in the schools of the KCMSD";[16] "low achievement" and a "general attitude of inferiority among blacks";[17] racial isolation in the schools;[18] and severe deterioration in the physical conditions of the schools, which led to student withdrawals from the schools, which led in turn to further deterioration.[19] As discussed earlier, to cure these

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[16] App. 155a (emphasis in original).

[17] App. 211a. Judge Clark found that "[s]everal witnesses confirmed the conclusion" reached by this Court in *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954), *i.e.*, that segregation had "ruin[ed] attitudes" of students in KCMSD. *Id.* He furthermore found that KCMSD's history of segregation had "bogged down" the "education process" and "[t]oo often, as a result, a higher percentage of black students are among the lower achievers." App. 164a.

[18] Specifically, he found that "as of 1974, 20 years after *Brown I*, 39 schools were more than 90+% black" and that "[e]ighty percent of all blacks in the District attended schools that were 90% black." App. 212a. He further found that while some improvement had occurred by 1983-84, there were still "24 schools . . . racially isolated with 90+% black enrollment" and that the dual school system had not yet been dismantled. App. 213a. He furthermore found that between the years immediately after *Brown* and the present, the black school population had shifted from just over 20% to just under 70%, App. 217a, that the total enrollment of white students had fallen by 80%, *id.*, and that the segregated system had caused the departure of whites to private schools and the suburbs. August 25, 1986 Order, Opp. App. 8a.

[19] Judge Clark found that the deterioration flowed directly from the State's failure to remedy its previous unconstitutional segregation: "the State of Missouri by its constitutional violations and subsequent failure to affirmatively act to remove the vestiges of the dual school system certainly contributed to an atmosphere which prevented the KCMSD from raising the funds to maintain its schools." App. 69a. Significantly, in affirming the latter findings, the Eighth Circuit expressly noted that the State's failure to remedy its unconstitutional conduct had produced a downhill slide in the quality of education: "The findings of fact demonstrate a spiraling effect of white children leaving KCMSD schools and KCMSD's white constituency withdrawing its financial support

related, continuing vestiges of State-imposed segregation, Judge Clark approved a desegregation remedy with two primary components: a capital-improvement plan and a magnet-school plan. Contrary to the State's petition, however, neither component was intended as an end in itself; rather, both were found by Judge Clark—and the Eighth Circuit—to be *necessary* to cure the inferior education and racial isolation that remained as vestiges of the unconstitutional segregation. They were designed to do this in two complementary ways: restoring the educational quality of the schools to the level where they would have been but for the segregation and, through both that general higher quality and the specific magnet program, attracting voluntary transfers to KCMSD schools by non-minority students which would decrease the racial isolation produced by the segregation.[20]

As a touchstone for measuring the educational level to which the KCMSD schools had to be restored, Judge Clark relied in part on the quality necessary for the schools to achieve the AAA status already gained in all the surrounding districts.[21] He concluded that achieving that classification was the appropriate "first step in

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from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle." App. 17a-18a (footnotes omitted).

[20] Thus, as Judge Clark found in ordering implementation of the two programs, "the capital facilities program requested by the KCMSD is a proper remedy through which to remove the vestiges of racial segregation, and is needed to attract non-minority students back to the KCMSD." App. 124a. Similarly, Judge Clark determined that the magnet-school plan should be adopted "as part of the Court's overall plan to eliminate the vestiges of unlawful segregation in the KCMSD . . . ." App. 121a.

[21] This was because, as he found, while KCMSD was rated only AA, *all* other school districts in the Kansas City area are rated AAA. App. 159a. Further, he found that both "patrons" and "potential students" of KCMSD "view a AAA rating as an important factor in measuring the school's ability to educate its students." App. 162a. In addition, he noted that both KCMSD and the State "endorse[d] achieving AAA status." App. 158a.

KCMSD's journey to regain and maintain a quality education program and could serve to assist in attracting and maintaining non-minority student enrollment." App. 162a.

Based on the foregoing, as the State quotes in its petition (at 14-15), Judge Clark reasoned that: "[t]he long term goal of this Court's remedial order is to make available to *all* KCMSD students educational opportunities equal to or greater than those presently in the average Kansas City, Missouri metropolitan suburban school district." App. 145a-46a. But, as Judge Clark made unmistakable in the very next sentence of his order (which the State *omits* from its petition), bringing KCMSD to a level roughly comparable to the surrounding districts was *not* an end in itself; it was a *means* of curing the State's unconstitutional conduct:

> In achieving this goal the victims of unconstitutional segregation will be restored to the position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment. [App. 146a.]

As the Eighth Circuit held in rejecting the State's argument below:

> Careful reading of the district court's order shows that the court did not view improving education for all KCMSD students as an end in itself, but *as a means to serve the goals of restoring to the victims the education they have been denied* and of attracting and maintaining whites in the KCMSD. We cannot say that the district court abused its discretion in using system-wide educational enhancements to *accomplish its legitimate desegregative objectives.* [App. 13a-14a (emphasis supplied).]

Once it is made apparent that the issue raised by the State is a false one, it also becomes apparent that what the State truly attacks is not the adoption of impermissible goals, but the factual findings and exercise of equitable discretion that resulted from the the lower courts' pursuit of permissible goals. But nothing in those find-

ings or that exercise presents an important issue meriting this Court's review. Rather, as the previous discussion has shown, the two essential issues confronted by the lower courts in the present orders were: (1) what are the lingering effects of segregation in KCMSD? and (2) how can those effects best be remedied? As to the first question, Judge Clark found, and the Eighth Circuit agreed, that segregation in KCMSD has produced inferior education, deteriorating physical facilities, and racial isolation that still remain in the District. While it is clear from its petition that the State does not agree with all the lower courts' findings, it cannot show—indeed, it has not even argued—why this Court should abandon its rule against disturbing such findings.[22]

Likewise, regarding the second issue—how best to remedy the identified vestiges of segregation—the district court found, and the Court of Appeals agreed, that certain kinds of educational improvements were both reasonable and necessary to achieve that end. Again, the State does not contend that this Court should disturb these findings. Neither has it shown that the district court abused its broad discretion to remedy the effects of segregation.[23] Indeed, the two primary tools employed by the lower courts—capital improvements and magnet

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[22] This Court has repeatedly held that it will not disturb findings of fact concurred in by both a district court and court of appeals. *See, e.g., Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317 n.5 (1985); *NCAA v. Bd. of Regents*, 468 U.S. 85, 98 n.15 (1984); *Washington Metro. Area Transit Auth. v. Johnson*, 467 U.S. 925, 928 n.5 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

[23] This Court has repeatedly stressed not only the breadth of the federal courts' equitable powers to remedy past discrimination, *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43 (1971), but also the considerable deference owed to the lower courts' exercise of those powers because they have "first-hand experience with the parties and [are] best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands.'" *United States v. Paradise*, 480 U.S. 149, 184 (1987), (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 6).

schools—are both well-established means for undoing the harm of segregation.[24]

The truth of the matter is that the remedial orders now before this Court are concerned almost exclusively with the complex details of how many and which kinds of magnet schools and capital improvements are necessary to restore KCMSD to where it would have been but for the years of unconstitutional segregation. The working out of those details is committed to the fact-finding authority and sound discretion of the lower courts. Nothing in them presents an important issue of law for this Court's consideration.

B. It is Well-Settled that the Lower Courts could Enjoin State-Law Limitations on Local Officials' Taxing Authority, or Require Local Officials to Exercise their Taxing Authority, where such Action was Necessary to Remedy a Constitutional Violation

Both lower courts found that KCMSD had insufficient revenues to fund its constitutional obligation, that all available means to obtain the needed revenues had been exhausted, and that local officials could therefore be required to exercise their property-tax authority to produce the necessary funds.[25] Nevertheless, no such requirement was imposed in this case; rather, the Eighth Circuit determined that an order enjoining the pertinent Missouri State laws would permit local authorities to select and impose a property tax sufficient to meet their constitutional obligations. As the Eighth Circuit held, "the basic effect of the district court's order was to set aside levy limitations on [KCMSD's] taxing authority."

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[24] The Opposition of Respondent Kalima Jenkins, *et al.*, catalogues the repeated use and approval of such tools by this Court, the lower courts, and the Congress.

[25] Judge Clark also directed local officials to exercise their bond-issuing authority in order to finance the necessary capital improvements. No challenge to that direction was raised either in the Eighth Circuit or in the petitions before this Court.

App. 39a-40a.[26] Contrary to the State's claim, therefore, no question of a judicially-imposed tax is presented. Instead, the lower courts have merely exercised a fundamental power of the federal judiciary—enjoining State laws which thwart vindication of constitutional rights.

Moreover, even if the question raised by the State were fairly presented, this Court's cases long ago resolved that question. Indeed, the Court has repeatedly determined that where no other recourse is available to remedy a governmental entity's constitutional violation, the federal courts may require the entity to exercise its taxing power, and may further require that State-imposed limitations on that power give way. Thus, in *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658 (1978), the Court recognized a long line of cases in which it had "vigorously enforced the Contract Clause against municipalities—an enforcement effort which included . . . ordering that taxes be levied and collected to discharge federal-court judgments *once a constitutional infraction was found.*" *Id.* at 681 (emphasis supplied). *Accord, Owen v. Independence*, 445 U.S. 622, 639 n.19 (1980).

Similarly—and closer to the factual circumstances of this case—in *Griffin v. County School Board, supra*, this Court addressed the federal courts' power to require local authorities to impose tax levies where necessary to implement a desegregation decree. There, the Court unanimously declared that it had "no doubt of the power of the [lower] court" both to enjoin the issuance of tax credits to private, segregated schools and "if necessary to prevent further racial discrimination, require the supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination [the] public school

[26] Significantly, petitioners do not challenge the Eighth Circuit's critical construction of the pertinent Missouri law. Moreover, just last term this Court reaffirmed that it "normally defer[s] to Courts of Appeals in their interpretation of state laws . . . ." *Maynard v. Cartwright*, 108 S. Ct. 1853, 1857 (1988).

systems . . . ." 377 U.S. at 232-33. Furthermore, just as this Court in its Contract Clause cases held that State laws which unconstitutionally impair the municipality's ability to meet its debt obligations must give way, so too in its desegregation cases the Court has repeatedly declared that State laws interfering with a municipality's obligation to remedy its unconstitutional segregation must likewise give way.[27]

In an effort to distinguish this well-settled doctrine, the State advances several wholly erroneous contentions. First, it contends that the Court's Contract Clause cases hold that a judicial order requiring a tax levy is valid *only* "when [the legislative] department has directed or authorized such tax to be imposed. If no tax has been provided for . . . granting the [order] would be an assumption of legislative power . . . ." State Pet. 24 n.31 (quoting *United States v. New Orleans*, 98 U.S. 381, 391 (1878)). But this quote is not from the Court's decision at all, but rather from the *losing argument* of the City of New Orleans in the cited case. In *rejecting* that argument, Justice Field held for a unanimous Court that while "the power of taxation belongs exclusively to the legisla-

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[27] *See, e.g., North Carolina State Bd. of Educ. v. Swann*, 402 U.S. at 45 ("if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct . . . the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees"). Moreover, as the Eighth Circuit recognized, this Court's later citations to *Griffin* and *North Carolina State Bd. of Educ.*—even in nondesegregation contexts—leave no doubt of the broad principle for which they stand. Thus, as the Eighth Circuit quoted from *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979):

> State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause . . . . [The state] parties . . . may be ordered to . . . implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so. *E.g., North Carolina Board of Education v. Swann*, 402 U.S. 43; *Griffin v. County School Board*, 377 U.S. 218. [App. 35a (quoting 443 U.S. at 695) (other citations omitted).]

tive branch of the government," a governmental unit that has been delegated taxing power may be judicially ordered "to exercise the power" when it has a legal "duty" to do so. 98 U.S. at 392, 397. Furthermore, in a subsequent case, and again writing for a unanimous Court, Justice Field explained why a judicial order requiring a tax levy may be necessary even when State law would prohibit the levy:

> It is true that the power of taxation belongs exclusively to the legislative department, and that the legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including among others, that of taxation, *subject, however, to this qualification,* which attends all State legislation, *that its action in that respect shall not conflict with the prohibitions of the Constitution of the United States* . . . . Legislation producing this latter result . . . must be disregarded . . . . [*Wolff v. New Orleans*, 103 U.S. 358, 365 (1880) (emphasis supplied).]

The State simply misunderstands these cases when it contends, with inappropriate hyperbole, that "it would be an astonishing proposition to maintain that Article III required the States to share with the *federal judiciary* their sovereign powers over taxation." State Pet. 25. No one in this case—or in this Court's Contract Clause or desegregation cases—ever contended that a federal court has taxing power. What it does have is the power to require a State or municipality to exercise *its* taxing power where the Constitution commands that exercise, or to set aside State law that precludes its necessary constitutional exercise.[28] As the Court said in *Griffin*, "the District

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[28] For its contrary view, the State relies heavily on this Court's decision in *Rees v. Watertown*, 86 U.S. 107, 116-17 (1873). State Pet. 23. But that case is completely inapposite. *Rees* concerned nothing more than a city's failure to pay a debt. This Court held that while a judicial order requiring the city to pay *was* appropriate, it was not appropriate for the federal court to levy a tax for the purpose of paying the debt *where a state statute in existence at the time the debt was incurred expressly prohibited such a tax.* 86 U.S.

Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is their to levy taxes . . . ." 377 U.S. at 233.[29] That is precisely what Judge Clark ordered in this case. And, as modified by the Eighth Circuit, his order does no more than enjoin State laws which prohibit local, elected authorities from imposing a tax *they* find necessary to meet their constitutional duty. This Court's cases long ago settled the judicial authority for such an order, and nothing in the present petitions justifies reconsideration of those cases.[30]

120-21. Accordingly, quite unlike *Griffin*, the Contract Clause cases, and the present case, there was in *Rees* no *constitutional* violation justifying the overriding of state laws and the court therefore had no authority to devise a tax expressly prohibited by those laws.

[29] The State acknowledges that "[t]here is no question that this Court in *Griffin* seemed to approve of judicially-compelled taxes," but it contends that "the Court cited no support for this controversial proposition" and that it was not "so compelling as to be the last word on the issue." This is particularly so, the State says, because the Court "has never said, before or after" that a federal court is ever empowered to order a tax levy. State Pet. 24. All of this is not only presumptuous; it is also flatly wrong.

When *Griffin* explicitly recognized the power of a federal court to order a tax levy when necessary to remedy an Equal Protection violation, it did precisely what the Court had repeatedly done in its long line of Contract Clause cases: acknowledge that the power to tax is a legislative power, but declare that the exercise of that power may be judicially ordered when the Constitution commands it. Moreover, the *Griffin* Court made clear that the ordering of a tax levy stands on the same footing and is justified "[f]or the same reasons" as is any other component of a desegregation decree—it is appropriate if necessary to remove racial discrimination from a public-school system. 377 U.S. at 233. Thus, contrary to the State's contention, *Griffin* was certainly not an idle, unprecedented pronouncement. Rather, it was representative of and consistent with settled doctrine. Furthermore, and again contrary to the State's view, subsequent to *Griffin* the Court has repeatedly reaffirmed the efficacy of the case and the principles for which it stands. *See Monell, Owen,* and *Washington State Commercial Passenger Fishing Vessel, supra.*

[30] The State argues, however, that even if it were settled that in some cases an order requiring or permitting a tax levy is justified,

C. The Lower Courts Acted Well Within Their Discretion to Deny Intervention to Petitioners Clark and Jackson County, and that Denial Clearly Raises No Issue Meriting this Court's Review

While petitioners Clark and Jackson County attempt to argue the merits of the desegregation action in their petitions to this Court, they are clearly not entitled to do so because they were not parties in either the district court or the Court of Appeals.[31] Moreover, even if they were entitled to address the merits, the questions they raise are in substance the same ones raised by the State and are unworthy of this Court's review for the reasons presented in this opposition.[32]

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the Court should grant certiorari to determine the appropriateness of the levy in the circumstances of this case. But the State's *only* argument that a tax was not justified here is its wholly fallacious contention that the lower courts "made no effort to avoid interference with local taxing authority." State Pet. 27. By this the State means that to "avoid interference" the lower courts should have cut programs from the desegregation plan so that a tax would not be required. State Pet. 27. In other words, the State's view is that the constitutional remedy should have been reduced to match KCMSD's available funds. This upside-down view of the federal courts' role in protecting constitutional rights is not worthy of this Court's consideration.

[31] *See United Auto. Workers v. Scofield*, 382 U.S. 205 (1965); *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917). Only if this Court first granted certiorari on the question of the denial of intervention itself, and reversed that denial, could Clark and Jackson County acquire standing to challenge the judgment of the Court of Appeals. *See In re Leaf Tobacco Bd.*, 222 U.S. 578, 581 (1911); *Ex Parte Cutting*, 94 U.S. 14, 20-22 (1876); *see also Pennsylvania v. Rizzo*, 530 F.2d 501, 508 (3d Cir. 1976) ("one properly denied the status of intervenor cannot appeal the merits of the case") (citing *Hoots v. Pennsylvania*, 495 F.2d 1095 (3d Cir.), *cert. denied*, 419 U.S. 884 (1974)).

[32] The only issue raised by Jackson County or the Clark group that is not also raised by the State concerns the alleged applicability of the Tax Injunction Act (28 U.S.C. § 1341) to the present proceeding. However, in a separate decision, which Jackson County did *not* seek to bring before this Court, the Eighth Circuit expressly and correctly held that Act by its own terms to be wholly inapplicable

Likewise unworthy of review is the question of the denial of the Clark and Jackson County motions to intervene as of right.[33] Judge Clark denied those motions because they were untimely[34] and because granting them "would unduly delay the implementation of the remedy to which the plaintiffs are entitled." App. 60a, 61a. The Eighth Circuit affirmed, finding no abuse of discretion in Judge Clark's denial. App. 44a-45a (citing *NAACP v. New York*, 413 U.S. 345, 366-67 (1973)).[35] That court furthermore found the denial harmless because the intervenors failed to show that their interest was not adequately represented by the State and because, in any event, they were permitted to participate in the proceed-

---

to the orders entered in this case. *In re Jackson County, Mo.*, 834 F.2d 150 (8th Cir. 1987). Accordingly, even if Jackson County had standing to raise questions related to the merits of the Eighth Circuit's judgment in this case, it clearly cannot raise questions not presented below in this case. *See e.g., Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980) (declining to consider "a claim that was not presented to the courts below").

[33] As the Eighth Circuit noted, Clark and Jackson County also sought permissive intervention, which was also denied, but that denial was not appealed. App. 42a n.22. It is therefore not before this Court.

[34] As Judge Clark noted, his order of July 6, 1987 announced his intention to levy a tax to produce the necessary funds; yet neither the Clark group of taxpayers nor Jackson County (responsible for collection of the tax) sought to intervene until *after* the court's September 15, 1987 Order had fully resolved the tax issue. App. 60a.

[35] The Eighth Circuit's denial of intervention was clearly in accord with the standards followed in the other circuits. *See, e.g., United States v. South Bend Community School Corp.*, 710 F.2d 394, 396 (7th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984); *Garrity v. Gallen*, 697 F.2d 452, 457 (1st Cir. 1983) (motion by group of black parents untimely when filed four-and-one-half months after decree); *Delaware Valley Citizens' Council v. Pennsylvania*, 674 F.2d 970, 974 (3d Cir. 1982) ("motion to intervene after entry of decree should be denied except in extraordinary circumstances"); *United States v. Louisiana*, 669 F.2d 314 (5th Cir. 1982); *Michigan Ass'n for Retarded Citizens v. Smith*, 657 F.2d 102 (6th Cir. 1981); *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 837 (1978).

ings as *amici curiae* (both through briefing and at oral argument). App. 45a n.23.[36] In these circumstances, not only were the rulings below clearly correct, in accordance with settled law, well within the lower courts' discretion, and harmless error at worst, but they plainly raise no important issue meriting this Court's attention.

III. The Court Should Not Disturb the Ongoing Desegregation Process to Review Legal Principles Finally Resolved Against the State in Earlier Proceedings

In addition to the serious doubt concerning the Court's jurisdiction and the lack of an important legal question meriting the Court's attention, there is a final reason why the Court should decline to grant certiorari—the questions the State now asks the Court to review were *all* resolved against it in earlier proceedings, and in each of those proceedings certiorari was either sought and denied or was not sought at all. The Court should not permit the State to relitigate those questions now, not only because the lower courts and the parties relied upon the earlier resolution of those questions in devising the present remedial orders, but also because such relitigation would surely delay and destabilize the already-too-long-delayed desegregation of KCMSD.

The State's first assigned question—an attack on the key elements of the desegregation plan—was in substance decided against it on the first appeal in this case, *Jenkins I*. There, as here, the State's chief complaints were that the significant deterioration in the schools was not a vestige of segregation and that a program designed to induce voluntary transfers of non-minority students to

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[36] Again, the Eighth Circuit's ruling was in full accord with settled law in the other circuits. *See, e.g., Mumford Cove Ass'n Inc. v. Groton*, 786 F.2d 530, 535 (2d Cir. 1986) ("no basis to rule that the district court abused its discretion in denying permissive intervention, particularly when it afforded appellants *amici* status"); *Bush v. Viterna*, 740 F.2d 350, 358 n.1, 359 (5th Cir. 1984) (per curiam); *Penick v. Columbus Educ. Ass'n*, 574 F.2d 889, 890 (6th Cir. 1978); *Blake v. Pallan*, 554 F.2d 947, 955 (9th Cir. 1977).

KCMSD schools was impermissible.[37] Both Judge Clark and the *en banc* Eighth Circuit rejected these complaints [38] and, although certiorari was sought by plaintiffs and KCMSD on the question of interdistrict relief, the State did not seek review of the Eighth Circuit's decision at all.[39] As a result, the capital-improvements and magnet-school plans now before this Court were implemented and are in the third year of a five-year program. The State has offered no reason why it should be permitted to attack the basic elements of that program on grounds it lost in *Jenkins I* (and did not petition to this Court) and thereby threaten the delicate progress that program is making.[40]

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[37] The State's other central complaint here is against the lower courts' use of the quality of education in the suburban schools as a guide to the level to which KCMSD must be restored to cure the unconstitutional segregation. However, as earlier described (pp. 16-18), in *Jenkins I* the State acknowledged the propriety of programs designed to achieve for KCMSD the AAA status already enjoyed by the suburban schools. It should not be heard to reject that proposition now.

[38] 807 F.2d at 683-84, 685; App. 185, 189a-90a.

[39] The State *did* seek review of similar issues in *Liddell*, and this Court denied certiorari. *Missouri v. Liddell*, 469 U.S. 816 (1984).

[40] In 1987-88, after years of steady decline, the KCMSD's non-minority student percentage at last showed a small increase. Moreover, some of the District's schools have experienced significant voluntary desegregative gains as they have converted to magnet schools. For example, Central Middle School, located in a heavily minority residential area, was virtually 100 percent black when the plan was implemented. With the establishment of a computer theme, it now has a non-minority student population of 20 percent. Faxon Elementary was only 4 percent non-minority in 1987-88; it opened as a Montessori school in the fall of 1988 at 39 percent non-minority. Pinkerton Elementary was only 2 percent non-minority in the fall of 1987. In the fall 1988, it opened as a Latin Grammar Magnet School, complete with a curriculum including Latin, uniforms, and a strict discipline code, and attracted a 40 percent non-minority student enrollment. This progress, at these schools and others, is all the more impressive considering that the capital improvements are still underway at many schools, necessarily causing some disruption and temporary relocation.

The State's second assigned question—its attack on the authority of the courts to assure funding of the desegregation plan through a tax increase if necessary—has been twice resolved against it prior to the present proceeding. Thus, in *United States v. Missouri, supra* (a case involving St. Louis area school districts), the *en banc* Eighth Circuit for the first time addressed the power of Missouri federal courts to require property tax increases to fund a desegregation plan. There, as here, the local school districts did not have sufficient funds to meet their constitutional obligation and there, as here, the district court ordered that the necessary property tax levy be put in place, notwithstanding contrary Missouri law. On appeal, the Eighth Circuit (relying on *Griffin* and *Swann*) affirmed the district court's authority to issue such an order, and in so doing, rejected the same claims the State makes here. *Missouri*, 515 F.2d at 1372. Certiorari was sought on the issue and denied by this Court. 423 U.S. 951 (1975).

Subsequently, in *Liddell*, the *en banc* Eighth Circuit again faced this same question and again relying on *Griffin*, *Swann*, and *North Carolina Bd.*, as well as on the Contract Clause cases, rejected the State's arguments which it repeats here. 731 F.2d at 1320-22. Significantly, the State—represented by the same counsel who represent it here—petitioned for certiorari, but *not* on that issue. However, the City of St. Louis did petition on that issue and, as in the previous *Missouri* case, this Court again denied certiorari. *Leggett v. Liddell*, 469 U.S. 816 (1984).

It is not our contention, of course, that this Court *may not* review matters that have become the law of the case or that have been repeatedly denied on certiorari. Rather, it is simply our contention that the Court *should not* review them where, as here, the Court's jurisdiction is in serious doubt, where the assigned questions are not fairly raised, where the matters that *are* fairly raised

are well-settled, where the State has had repeated opportunities to litigate those matters, and where affording the State yet another opportunity to litigate them could have a serious, disruptive effect on the ongoing desegregation process.[41] Given the long history of this case and the great care Judge Clark and the Eighth Circuit have given to the present remedial orders, only the most compelling showing would justify that disruption and the State has plainly not made it.

Indeed, it is submitted that to grant the State's petition and permit it to relitigate long-settled matters would be to condone and reward the continued resistance to the desegregation process the State has displayed throughout these proceedings. As Judge Clark remarked nearly three years ago during the remedial hearings:

> [T]he thing that concerns me is that 32 years have passed [since] May of 1954, and to my knowledge the State of Missouri has done nothing voluntarily, affirmatively, to carry out its constitutional duties . . . . [Transcript of Hearings on the Long-Range Magnet School Plan, September 19, 1986, at 1000 (Vol. V).]

It is time to permit the lower courts' carefully-developed remedial orders to proceed, unimpeded by further State efforts to resist paying for the harm of the segregation it mandated in its schools.

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[41] The key to the success of the plan ordered by Judge Clark will be the voluntary choices of parents to enroll their children in magnet schools. Those schools are designed to desegregate by drawing children out of their neighborhoods to schools offering educational themes that will extend through their school years. Accordingly, parents considering transfers to the magnet schools must be assured about the stability and continuity of the program if the necessary, voluntary desegregation is to occur. The State's unrelenting appeals of Judge Clark's orders (including five appeals now pending before the Eighth Circuit from eight separate district court orders) threaten that stability and continuity. A grant of certiorari by this Court would surely undermine it further.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

Respectfully submitted,

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March 17, 1989

APPENDIX

APPENDIX

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

January 3, 1989

John B. Williams, Esq.
2nd Floor, Jackson County Courthouse
415 E. 12th Street
Kansas City, Missouri 64106

Re: Jackson County, Missouri, et al. v. Kalima Jenkins, etc., et al.

Dear Mr. Williams:

Your application for an extension of time within which to file a petition for writ of certiorari was received December 31, 1988 and is returned as out-of-time.

Please note that a petition for rehearing en banc does not toll the time for filing a petition for a writ of certiorari, only a petition for rehearing would toll the time. See Rule 40 of the Federal Rules of Appellate Procedure and Rule 20.4 of the Rules of the Supreme Court. Please note that Rule 35(c) of the Federal Rules of Appellate Procedure clearly states that the pendency of a petition for rehearing en banc shall not affect the finality of the judgment of the Court of Appeals. Accordingly, the time to file this petition for writ of certiorari began to run on August 19, 1988 when the judgment was announced.

Very truly yours,

JOSEPH F. SPANIOL, JR.
Clerk

By

FRANCIS J. LORSON
Chief Deputy Clerk

th
Enc.
cc: Clerk, USCA-8th Circuit (Your Nos. 86-1934, 2537, 87-1749, 2299, 2300, 2588)

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U.S. Court & Custom House
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August 19, 1988

Hon. William Webster
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Re: 86-1934WM+ Kalima Jenkins, et al. v. State of Missouri

Dear Counsel:

Enclosed is a copy of the opinion filed today in the referenced case. Judgment in accordance with the opinion is also entered today.

Please review Federal Rules of Appellate Procedure 35 and 40 and Eighth Circuit Rules 15 and 16. Petitions for rehearing *must* be received by the Clerk's office within the time set by FRAP 40 (within 14 days of entry of judgment) unless extended by court order. Petitions for rehearing or motions to extend the time for filing rehearing requests are not afforded any grace period for mailing and are subject to being denied if not timely received. Please review Eighth Circuit Rule 16(d) if an en banc request is contemplated.

You are also directed to Federal Rule of Appellate Procedure 39 and Eighth Circuit Rules 7(f) and 8(j).

Itemized and verified bills of costs are to be filed with this office with proof of service within 14 days from this date. Counsel for the prevailing party should promptly forward to us an itemized bill of costs for the reproduction of the authorized number of copies of their briefs. Failure to submit an itemized bill of costs will result in waiver of costs. Untimely itemized bills of costs will not be processed without a special order of the Court. Objections to requested bills of costs must also be submitted on a timely basis—within 10 days of the bill of costs.

Sincerely,

ROBERT ST. VRAIN
Clerk

/s/ Michelle McCloud
By: MICHELLE MCCLOUD
Deputy Clerk

RStV/mlm
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cc: All Counsel of Record
(See attached listing)

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Updated 3/18/88

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

vs.

STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

[Filed Aug. 25, 1986]

The Kansas City Missouri School District (KCMSD) has moved this Court for an order enjoining the rollback in the real estate tax levy otherwise required under Proposition C. (R.S. Mo. §§ 163.057 and 164.013).

Responses to the motion have been filed on behalf of the plaintiffs and the State of Missouri. Plaintiffs support the motion. The State urges that KCMSD be required to pay its share of desegregation costs; it takes no position as to the method through which KCMSD obtains the funds to meet its burden.

In previous memorandum opinions issued, this Court has set forth detailed findings of fact and reasoned statements of law regarding constitutional violations practiced by the State and the KCMSD as well as comprehensive plans in an effort to place the victims of the violations in substantially the position which they would have occupied had the violations not occurred. The Court will not repeat in this order in any detail previous findings

of fact and conclusions of law set forth in previous opinions.

The Court has found that segregated schools, a constitutional violation, has led to white flight from the KCMSD to suburban districts, large number[s] of students leaving the schools of Kansas City and attending private schools and that it has caused a system wide reduction in student achievement in the schools of KCMSD. It has also found that by improving the quality of education in the KCMSD, it will enhance the appeal of the school system, thus giving it a chance to retain its present white enrollment and also encourage whites in private and suburban schools to enroll in its schools. As set forth in its order of June 14, 1985, the basic remedial principle in school desegregation cases, is that "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

As indicated in its order of June 14, 1985, this Court is aware that there are limitations on the remedial powers of a federal court to correct constitutional violations. While remedies in desegregation cases are drawn from the heart of equity, they should not be broader in scope than necessary to restore the victims of the violations to the position they would have occupied in the absence of such conduct.

Before issuing the remedial order of June 14, 1985 and the amendment thereto entered June 16, 1986, this Court was of the firm conclusion that the plans were not wider in scope than necessary to correct the constitutional violations and to restore the victims thereof to the positions which they would have occupied in the absence of such violation. The United States Supreme Court observed in *Watson* v. *Memphis*, 373 U.S. 526, 537, 83 S. Ct. 1314, 10 L. Ed. 2d 529 (1963), "it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."

It was held in *Haney* v. *County Board of Education of Sevier County*, 429 F.2d 364 (8th Cir. 1970) that the remedial power of the federal courts under the Fourteenth Amendment is not limited by state law. *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 91 S. Ct. 1284, 28 L. Ed. 2d 586 (1971) held that state policy must give way when it operates to hinder vindication of federal constitutional guarantees.

A federal court's authority to impose or raise taxes has been recognized by the United States Supreme Court in *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964) and *Louisiana ex rel. Hubert* v. *Mayor and Council of New Orleans*, 215 U.S. 170, 30 S. Ct. 40, 54 L. Ed. 144 (1909) and by the Eighth Circuit Court of Appeals in *United States* v. *Missouri*, 515 F.2d 1365 (1975) and in *Liddell* v. *State of Missouri*, 731 F.2d 1294 (1984).

Judge Stephenson stated in *United States* v. *Missouri*:

> It is anomalous to suggest that the district court has the power to disestablish a dual school system and does not have the power to fashion an appropriate remedy.

515 F.2d at 1372.

The court in *Liddell* v. *State of Missouri*, 731 F.2d at 1320 stated:

> We hold that the district court's broad equitable powers to remedy the evils of segregation include a narrowly defined power to order increases in local tax levies on real estate. Limitations on this power require that it be exercised only after exploration of every other fiscal alternative.

The court then set forth some of the alternatives which should be pursued.

In the Court's order of June 16, 1986, it assessed the KCMSD's portion of the desegregation budget for the

fiscal year 1986-87 at $12,593,751.00. The KCMSD contends, and the Court so finds, that revenues available to it for the 1986-87 fiscal year are insufficient by $6,300,000 to meet its share of the desegregation budget. Unless it can obtain additional funds the only alternative it has is to make major reductions in services of its regular educational program. The Court is of the opinion that this would be in direct conflict with the goals sought to be obtained through the desegregation plan.

KCMSD has made eight attempts in the last seventeen years to obtain voter approval of an increase in the tax levy. The last two attempts were in February and August of 1986 which required only a majority vote for approval. Obviously it would be futile to submit a bond issue which would require a two-thirds majority for approval. KCMSD has made efforts to obtain funding from charitable and civic groups. It has also approached the city council in regard to an additional sales tax without success and was unsuccessful in obtaining any appreciable extra funds from the state legislature. The District has made a diligent effort, though unsuccessful, to obtain funding for its share of the desegregation budget for the present fiscal year. Thus it appears that the only alternative left for the KCMSD is to seek relief from the Court.

The Court has previously held that the State should pay the major cost of a desegregation plan but that the KCMSD, also a violator, should share in that cost.

The Court stated at page 43 of its June 14, 1985 order that it was reluctant to take any action to increase taxes. The Court is not insensitive to the fact that a majority of those patrons of KCMSD who chose to vote in February and August of 1986 were opposed to a tax levy increase. However a majority has no right to deny others the constitutional guarantees to which they are entitled. This Court, having found that vestiges of unconstitu-

tional discrimination still exists in the KCMSD, is not so callous as to accept the proposition that it is helpless to enforce a remedy to correct the past violations. Failure of the KCMSD to come forward with its share of funds to implement the remedial plan would certainly operate to hinder vindication of federal constitutional guarantees to which the school children in the KCMSD are entitled. This Court cannot shirk its sworn duty to uphold the Constitution of the United States. Therefore, it is hereby

ORDERED that the motion of the KCMSD to enjoin the rollback in the real estate tax levy otherwise required under Proposition C is granted; and it is further

ORDERED that the tax levy rollback required by § 164.013, R.S. Mo. (the Proposition C rollback) shall be enjoined to the extent necessary to raise an additional Six Million Five Hundred Thousand Dollars ($6,500,000.00) to enable the KCMSD to meet its share of the desegregation plan for the current fiscal year.

/s/ Russell G. Clark
RUSSELL G. CLARK
District Judge
United States District Court

Dated: August 25, 1986

MOTION FILED
MAR 20 1989

Nos. 88-1150, 88-1194, & 88-1228

In The
Supreme Court of the United States
October Term, 1988

State of Missouri, et al.,
Petitioners,

v.

Kalima Jenkins, et al.,
Respondents.

Icelean Clark, et al.,
Petitioners,

v.

Kalima Jenkins et al.,
Respondents.

Jackson County, Missouri, et al.,
Petitioners,

v.

Kalima Jenkins, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICI CURIAE OF THE NATIONAL TAXPAYERS UNION AND NATIONAL ASSOCIATION OF MANUFACTURERS

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Nos. 88-1150, 88-1194, & 88-1228

In The

Supreme Court of the United States

October Term, 1988

State of Missouri, et al.,
Petitioners,

v.

Kalima Jenkins, et al.,
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Petitioners,

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Kalima Jenkins et al.,
Respondents.

Jackson County, Missouri, et al.,
Petitioners,

v.

Kalima Jenkins, et al.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF ALL PETITIONERS

The National Taxpayers Union and National Association of Manufacturers respectfully move this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed brief and brief amici curae. In support of this motion, the movants state:

1. The amicus National Taxpayers Union is a nonprofit, nonpartisan membership organization. It is dedicated to protecting the interests of federal, state and local taxpayers and functions through lobbying, public education and litigation.

2. The amicus National Association of Manufacturers is a voluntary business association of approximately 13,500 companies and subsidaries. The NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. NAM represents its constituency on public policy issues, including tax matters, at the Congressional level.

3. The amici have received the consent of all Petitioners, to wit, the State of Missouri, et. al., Icelean Clark, et.al., and Jackson, County, Missouri, et. al. Copies of these consents have been filed with the Clerk of the Court.

4. The Respondants, Kalima Jenkins, et. al., School District of Kansas City, Missouri, et al. and American Federation of Teachers, Local 691 refused consent to the filing of this brief.

5. This motion and the accompanying brief are timely filed.

6. The annexed brief amici curiae emphasizes special matters concerning the issues raised by the District Court's order relating to the area of taxation in which the amici have a special interest and expertise, which may be of assistance to the Court in its deliberations on the above captioned Petitions for Certiorari.

For the foregoing reasons National Taxpayers Union and National Association of Manufacturers request that their Motion for Leave to File the annexed brief be granted.

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Counsel of Record for Amici

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Nos. 88-1150, 88-1194, & 88-1228

In The

Supreme Court of the United States

October Term, 1988

State of Missouri, et al.,
Petitioners,

v.

Kalima Jenkins, et al.,
Respondents.

Icelean Clark, et al.,
Petitioners,

v.

Kalima Jenkins et al.,
Respondents.

Jackson County, Missouri, et al.,
Petitioners,

v.

Kalima Jenkins, et al.,
Respondents.

BRIEF AMICI CURIAE OF THE NATIONAL TAXPAYERS UNION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF ALL PETITIONERS

The National Taxpayers Union and National Association of Manufacturers submit this brief as Amici Curiae in Support of the Petitions for Certiorari filed in the above-captioned actions. All three Petitions challenge the decision of the Eighth Circuit Court of Appeals in *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988).

INTEREST OF THE AMICI

The amici curiae are concerned about the dangers presented by judicially imposed taxes. If a court can unilaterally impose a tax, the ability of citizens to control taxation (either by direct vote or through their elected representatives) is impaired. Like our nation's founders, the amici oppose taxation without representation.

The amici do not seek to comment upon the merits of the other elements of the district court's remedy. The amici's position is based upon a commitment to democratic participation in taxation decisions, and emphatically not upon any opposition to racial integration.

The National Taxpayers Union (NTU) was founded as a citizens' lobby by concerned taxpayers in 1969. It is a nonprofit, nonpartisan membership organization devoted to protecting the interests of federal, state and local taxpayers through public education, lobbying and litigation on tax and spending issues. With members in all fifty states, the NTU represents over 150,000 taxpayers. NTU seeks to preserve the integrity of the political process by which taxes are imposed. If the Eighth Circuit decision is allowed to stand, the voice of citizens and their elected representatives in determining the level of taxation will be diminished, to the detriment of NTU's members.

The National Association of Manufacturers (NAM) of the United States is a voluntary business association of approximately 13,500 companies and subsidiaries. NAM's member companies employ 85% of all manufacturing workers in the United States and produce over 80% of the nation's manufactured goods. The NAM also is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. NAM's members are located in every state of the nation and are subject to a myriad of federal, state, and local taxes. NAM's policy states that "tax rates, deductions, credits and expenses should be continued to be established by statute." The NAM believes it is improper for a federal judge to ignore the tenets of taxation embodied in the Constitution and past taxing legislation. The precedential effect of this type of judicial action has far reaching implications for the NAM and its constituency, not to mention the electorate as a whole. Such a "remedy" could directly affect NAM's membership in areas beyond this case.

QUESTIONS PRESENTED

Does a federal court's broad equitable power to remedy constitutional violations permit it to order a specific increase in a tax?

In remedying a constitutional violation, may a federal court impose a tax in a manner that contradicts a voter-approved state constitutional provision limiting taxation?

SUMMARY OF ARGUMENT

Conflicts exist both between the circuits and between established lines of this Court's precedent regarding a court's ability to impose taxes. The power to impose a tax has been declared outside the normal boundaries of judicial action, yet other precendent implies that this power may be used to remedy constitutional violations. The circuit courts have differed radically in interpreting this Court's conflicting guidance. While several circuits have flatly rejected a judicial taxing power, others have exhibited uncertainty about their authority, and the Eighth Circuit has explicitly endorsed judicial taxation. Given this confusion, this Court should grant certiorari to clarify whether this extraordinary power exists.

ARGUMENT

I. BY GRANTING CERTIORARI THE COURT CAN RESOLVE A CONFLICT BETWEEN TWO IMPORTANT LINES OF CASES

The federal district court below ordered remedies for constitutional violations involving public school desegregation. The court ordered the defendant county to increase property taxes from $2.05 to $4 per $100 of assessed valuation to finance implementation of the remedies. The court of appeals upheld the imposition of the tax.[1]

The Eighth Circuit's decision in this matter marks the convergence of two significant lines of cases. One line of authority, stretching far back in American history, holds that it is beyond the power of the judiciary to unilaterally impose taxes, no matter how compelling the demand for governmental funding. The other line of cases is characterized by the

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[1]The court rejected another district court order imposing a state income tax surcharge.

exercise of broad equitable powers by the courts to remedy various constitutional violations. The fundamental issue raised by the Petitions for Certiorari is whether these remedies may extend to ordering local governments to impose specific tax increases.

A. JUDICIAL DECISIONS HAVE HELD THAT IT IS BEYOND THE POWER OF THE FEDERAL JUDICIARY TO ORDER STATES AND LOCALITIES TO IMPOSE A TAX

The Supreme Court dealt extensively and consistently with the judicial power to impose taxes in a line of cases beginning in the 1870's. The Court has been concerned with both preserving the boundary between the legislature and judiciary in matters of taxation as well as respecting the independent spheres of state autonomy. There can be little doubt of the constancy with which the Court has maintained its holding that taxation is a sovereign legislative act. A few samples of judicial and scholarly views will suffice to demonstrate the strength of this belief:

1788

"The judiciary . . . has no influence over either the sword or the purse . . ." The Federalist No. 78 (Hamilton).

1874

"It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the state government. *Heine v. Levee Commissioners*, 86 U.S. (19 Wall.) 655, 661 (1874).

1880

"The power of taxation is legislative and cannot be exercised other than under the authority of the Legislature." *Meriwether v. Garrett*, 102 U.S. 472, 501 (1880).

1899

"[I]f the legislature omits any property from the list of taxables the courts are not authorized to correct the omission and adjudge the omitted property to be subject to taxation." *New Orleans v. Stempel*, 175 U.S. 309, 313 (1899).

1924

"It has been said that 'the courts have no more power to assess, or

command the assessment of taxes, than the legislature has to adjudge or command the adjudication of law suits.'" T. Cooley, The Law of Taxation § 68 (4th ed. 1924).

1961

"Federal courts may not assess or levy taxes. Only the appropriate taxing officials . . . may assess and levy taxes . . . and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one." *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961).

The opposition of the Court to judicial taxation was most dramatically illustrated in the case of *Rees v. City of Waterton*, 86 U.S. (19 Wall.) 107 (1873). The city issued bonds to build a railroad. After the railroad was built, the city refused to pay the bonds. Plaintiff, a bondholder, had secured a judgment against the city, and obtained a writ of mandamus from a lower court ordering the city to collect a tax to pay his judgment. The city aldermen, however, kept resigning instead of performing the asserted duty. The Supreme Court found that the theories upon which the city's defense rested were "vicious" and that the city was blatantly refusing to pay an honest debt. Nevertheless the Court held that the judiciary does not have the power to order that a tax be levied. The Court stated, "We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments." 86 U.S. at 116.

Federal courts play a legitimate role in overseeing state and local taxation. See, e.g., *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 109 S. Ct. 633 (1989). The role is uniquely judicial, and is circumscribed by principles of comity. See *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981). The courts assure that state taxes do not violate federal constitutional requirements applicable to taxation. Appropriate concerns are, for example, that taxation by the states meets the requirements of equal protection and that it does not unduly burden interstate commerce. The judiciary's role does not, however, enter into the legislative arena to exercise the taxing power. This distinction--between judicial action that restrains state taxation within constitutional bounds and legislative exercise of the taxing power--is crucial.

B. JUDICIAL DECISIONS HAVE RECOGNIZED BROAD EQUITABLE POWERS TO IMPOSE REFORMS REQUIRING EXTENSIVE PUBLIC EXPENDITURES

Another line of cases has endorsed a more active role for the judiciary. This Court has repeatedly emphasized the wide range of discretion available to district courts in formulating effective remedies. To remedy constitutional violations, primarily involving school desegregation and prison conditions, the courts have entered injunctive orders that require extensive public expenditures.

More that 600 school districts have been controlled significantly by federal judges. Nagel, Controlling the Structural Injunction, 7 Harvard Journal of Law and Public Policy 395, 396 (1984). Courts have become involved in overseeing all facets of public school administration, "from broad policies governing entire school systems to narrow regulation governing school conduct." Fluckinger, The Changing Relationships of the Judiciary to the Policy and Administrative Processes of Government, 1985 Brigham Young Univ. L. Rev. 671, 677. Court-ordered desegregation has involved the expenditure of hundreds of millions, or perhaps even billions of dollars nationwide.

Similar pervasive judicial authority has been exercised in assuring adequate prison facilities. Judges have ordered reforms in most states; there are decrees affecting 270 local jails.[2] "Local officials have been ordered to do everything from hiring dozens of guards and other workers and building new, or substantially altering old, facilities, to appointing a prison ombudsman and creating a Department of Detention and Correction." *Rhem v. Malcolm*, 507 F.2d 333, 340 (2d Cir. 1974) (citations omitted). See also Fluckinger, *supra*, at 689-91. This Court noted that many courts "have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations." *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

The basic principle developed by the courts is that remedies for these types of constitutional violations are equitable. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power." *Brown v. Board of Education*, 349 U.S. 294, 300 (1955).

The remedial task is to correct, by a balancing of the individual

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[2]Nagel, *supra*, at 396. See, e.g., *Hutto v. Finney*, 437 U.S. 678 (1978); *Rhodes v. Chapman*, 452 U.S. 337 (1981).

and collective interests, the condition that offends the Constitution. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." 402 U.S. at 15; see also *Milliken v. Bradley*, 433 U.S. 267 (1977). "Since the ultimate objective of the remedy is to make whole the victims of unlawful conduct, federal courts are authorized to implement plans that promise 'realistically to work *now*.'" 433 U.S. at 280 n. 15 (emphasis in original). Proposed remedies must be assessed in light of the circumstances present and the options available in each instance. *Green v. County School Board of New Kent County*, 391 U.S. 430, 439 (1968).

The limits on equitable power have remained amorphous. Certain dicta in *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), seemed to indicate that a court may order local officials to exercise their power to levy taxes. 377 U.S. at 233. This decision is discussed extensively in the Petitions for Writ of Certiorari of the State of Missouri, et al., No. 88-1150, at 24, and of Icelean Clark, et al., No. 88-1194, at 17-23. The Court did not specify that the district court would itself be authorized to set particular tax levels or methods of collection. Although the Court did not spell out the details, it apparently contemplated that such decisions would be made by elected officials. The *Griffin* decision is at the root of lower courts' misguided attempts to extend the federal equitable remedy to include specific judicially ordered taxation. It was in reliance on *Griffin* that the Eighth Circuit imposed a tax in the case below.

C. THE COURT SHOULD RESOLVE THE CONFLICT IN ITS AUTHORITY BY HOLDING THAT THE FEDERAL POWER TO ORDER EQUITABLE REMEDIES DOES NOT EXTEND TO IMPOSING TAXES

Equity is an awesome power which functions outside the confines of ordinary law. The historical secret of the continued vitality of equity has been that equity judges have used the power with extreme circumspection. Thusly used, it has been a powerful tool in bringing fairness and sensible remedies into areas which the law could reach only with difficulty. However, extending the reach of the equitable remedy into the area of judicial taxation has crossed the boundary into areas where equity should not be extended. "The remedial powers of an equity court must be adequate to the task, but they are not unlimited." *Whitcomb v.*

Chavis, 403 U.S. 124, 161 (1971).

The Court explained its reluctance to exercise the taxing power in *Rees v. City of Waterton*, 86 U.S. (19 Wall.) 107 (1873), and reflected exactly the concern of the amici. "In seeking to obtain for the plaintiff his just rights," the Court held, "we must be careful not to invade the rights of others." 86 U.S. at 119. The concern here is likewise that the vindication of rights for some people should not trample upon the rights of others. No matter how compelling the case for remedying constitutional violations,[3] the Court is not empowered to void a basic fundamental of our constitutional system: the ability of the people to be represented in the decision to impose taxes.

II. BY GRANTING CERTIORARI THE COURT CAN RESOLVE A CONFLICT BETWEEN THE CIRCUITS

The Courts of Appeal have differed considerably in the course they have navigated between this Court's conflicting lines of authority described above.

A. THE EIGHTH CIRCUIT HAS ORDERED THE IMPOSITION OF TAXES TO REMEDY DISCRIMINATION

The Eighth Circuit Court of Appeals is the first appellate court to order a governmental unit to increase particular taxes to finance the implementation of a desegregation plan.[4] Other circuits have grappled with similar circumstances of unconstitutional discrimination in education. These circuits have mandated extensive remedial actions, but no other circuit has interjected itself into the position of tax collector.

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[3]See *Meriwether v. Garrett*, 102 U.S. 472, 518 (1880) (J. Field, concurring). ("However urgent the appeal of creditors and the apparent hopelessness of their position without the aid of the federal court, it cannot seize the power which belongs to the legislative department of the state and wield it in their behalf.")

[4]In addition to the decision below, the Eighth Circuit addressed this issue in *United States v. Missouri*, 515 F.2d 1365 (8th Cir. 1975), cert. denied, 423 U.S. 951 (1975); and *Liddell v. State of Missouri*, 731 F.2d 1294, (8th Cir. 1984).

This case is particularly troubling to the amici because the district court's opinion disregarded both state constitutional limits on taxation and the will of the electorate expressed through several popular votes.[5] The Missouri Constitution requires approval of two-thirds of voters to increase a tax levy above specified levels. Missouri Const. art. X, § 11 (c). Two citizen-initiated provisions also limit the legislative authority to raise property taxes. Appendix to Petition for Writ of Certiorari of Clark, et al., in No. 88-1194 at A36. [Hereinafter cited as App. at ___.]

The Eighth Circuit decision would negate these limitations on the taxing power of Missouri government. It authorizes the district court to enjoin state and county authorities from applying these measures to reduce the levy below an amount requested by the school board.

Missouri's tax limitation measures were motivated by fiscal concerns. They were not intended to be discriminatory, and they in fact operated neutrally.[6] The Eighth Circuit explicitly rejected a suggestion that judicial remedial powers to raise taxes can appropriately be exercised only where the state limitations are intended to hamper integration.

> "[W]e must reject the State's arguments that the district court's power to raise property taxes under *Griffin* is limited to cases in which . . . the state law limitations on a school district's taxing authority are enacted to prevent implementation of a desegregation order."

App. at A39. Given this explicit determination, this case presents a clear opportunity for resolving uncertainties about the federal judiciary's power to affirmatively exercise the state's taxing power in a manner not contemplated by state law. It also presents a clear opportunity to refine the relationship of federal remedial power and state legislative power.

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[5]The amici support the argument by Petitioners Icelean Clark, et al., that taxpayers should have been provided an opportunity to intervene when it became apparent late in the judicial process that their interests would be adversely affected.

[6]The Eighth Circuit noted that "there was no suggestion that state law restrictions had been adopted to evade the court's remedial orders." App. at A39.

B. OTHER CIRCUITS HAVE, SO FAR, REFRAINED FROM ORDERING STATE OR LOCAL TAX INCREASES

The other circuit courts have rejected attempts to impose judicial taxation, although some rulings have indicated confusion about this Court's ruling in *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964). See Annot., 76 A.L.R. Fed. 504. The Seventh Circuit upheld a district court ruling allocating to the state a portion of the costs of a desegregation plan. *United States v. Board of School Commissioners of Indianapolis*, 677 F.2d 1185, 1186 (7th Cir. 1982), citing *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 289-90 (1977). It took pains to clarify that it was not stepping into a taxing role appropriately left to the legislature.

> "The district court has not attempted to restructure state or local taxation. It has neither established tax rates nor mandated a particular method of determining tax rates. The district court has only forbidden the state from shirking its responsibility for the costs of remedying its wrongdoing."

677 F.2d at 1188. The Court of Appeals pointed out that the state legislature would retain its authority over school financing subject only to the requirement that it adequately support the desegregation plan.

> "The court's order does not limit the power of the General Assembly to reallocate state funds for all functions of state government, including the general support of local public schools, in light of the court-ordered obligations. The General Assembly may reduce appropriations to public schools generally, reallocate appropriations for other governmental functions, or raise taxes. It is not the province of a federal court to instruct the legislature on how it should finance its obligations to do so."[7]

The Second Circuit grappled with judicial exercise of the taxing

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[7]677 F.2d at 1190. Judge Posner, dissenting from the court's decision, would have circumscribed the court's role even more. "The end of an equity suit is an injunction, or if the injunction is not obeyed a contempt proceeding; it is not an inquiry into who will bear the costs of the injunction." 677 F.2d at 1192 (J. Posner, dissenting).

power in *Rhem v. Malcolm*, 507 F.2d 333 (2d Cir. 1974). Although finding prison conditions to be unconstitutionally deficient, the court noted that it could not require voters to make available the resources needed by public officials to meet constitutional standards. The *Rhem* court decided it was better for the district court to issue an order to close the prison, rather than direct the city to raise and allocate large sums of money, which would be a step "traditionally left to appropriate executive and legislative bodies responsible to the voters." 507 F.2d at 341.

> "[I]n order to build a new jail, the public must provide additional funds. This Court has no power whatsoever to require the public to do so. Under our system of government, the ultimate source of power is the people. The people have not given this Court any taxing power, or any control over their use of the taxing power."[8]

The district court in *Plaquemines Parish School Board v. United States*, 415 F.2d 817 (5th Cir. 1969), was directed by the Fifth Circuit to modify its permanent injunction to delete a provision requiring a school board to apply for federal aid programs. The Fifth Circuit read this Court's decesion in *Griffin* as allowing a district court to require a school system to levy taxes. 415 F.2d at 833. But seemingly uncomfortable with this conclusion, the *Plaquemines* court confined *Griffin* to its unusually extreme facts. The provision at issue was found to go beyond *Griffin* "as to source, manner and controls accompanying the funds." 415 F.2d at 833. The Third Circuit reached a similar conclusion in *Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978), holding that a lower court had not given adequate deference to the state's decisions about taxation.

The Eighth Circuit stands alone in actually upholding a judicially imposed tax increase. However, it is a fact that we live in an era of fiscal limitation. Seemingly intractable demands for spending are colliding with immovable limits on funds. This is particularly true in the area of education. It is also true in the area of prisons. In the future, the inadequacies of existing local financing may figure in spending for the handicapped or on public housing projects, or in determining local government liability for hazardous waste cleanups. When faced with insufficient government funds to finance court-ordered projects, courts may

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[8]*Id.* (quoting *Jones v. Wittenberg*, 330 F. Supp. 707, 712-13 (N.D. Ohio 1971), *aff'd sub nom. Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972). *See also Reece v. Gragg*, 650 F. Supp. 1297 (D. Kan. 1986).

look to the Eighth Circuit precedent. The role of judicial taxation threatens to increase as the courts grapple with difficult financial issues.

III. BY GRANTING CERTIORARI THE COURT CAN PROTECT THE LEGITIMATE LEGISLATIVE POWERS OF THE STATES AND THE ABILITY OF CITIZENS TO ULTIMATELY CONTROL TAXATION

Judicial imposition of taxes raises a number of complications about which the amici are concerned. Judicially imposed taxes are essentially standardless. Would courts be bound by citizen-initiated tax limitation measures? Must the same procedural safeguards for taxpayers be adhered to in judicially imposed taxes? How would the judiciary determine which taxing mechanism to utilize, and thereby select those upon whom the burden of taxation will fall?

The tendency of judicial taxation is to increase overall burdens on taxpayers. It deprives officials of the ability to decrease other expenditures in order to fund court-ordered remedies. Elected officials, faced with expensive court-ordered remedial measures, could opt to cut other governmental expenditures rather than increase taxes. Judicial taxation usurps the legitimate legislative powers of the states to allocate taxes among various classes of taxpayers or forms of taxation. The judiciary has little ability or right to weigh competing requests for public funds.

Judicial involvement in setting taxes presents the danger of stifling legitimate citizen opposition to tax increases. From the judicial perspective, "Opposition to an injunction that is thought to be enforcing some 'constitutional' requirement naturally seems illegitimate."[9] Vague orders have, in the past, been issued punishing elected officials for unfavorable votes or limiting the activities of opponents to judicially ordered plans.[10]

Judicial imposition of ta[illegible]presents particularly difficult questions

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[9]Nagel, *supra*, at 405.

[10]See cases cited in Nagel, *supra*, at 405; Comment, Community Resistance to School Desegregation: Enjoining the Undefinable Class, 44 U. Chicago L. Rev. 111, 147 (1976). See, e.g., *United States v. City of Yonkers*, 856 F. 2d 444 (2d Cir. 1988), *cert. granted sub nom. Longo v. United States*, No. 88-870.

in those situations where, as here, state law requires voters to ratify tax increases. The Missouri tax limitation measures represent an important statement by the people of Missouri about the power of government over citizens. The Eighth Circuit's rationale would increase the absolute size and power of government vis-a-vis citizens.

An active judicial role in setting tax policy threatens to diminish respect for the courts as objective arbiters. The routine use of judicial power to resolve difficult social problems weakens the democratic process. It removes from the public and elected officials the ability to forge important policies and political compromises. Major court decisions are not "forced through the sieve of trade-offs that take place in the legislative arena . . .". Greanias & Windsor, Is Judicial Restraint Possible in an Administrative Society?, 64 Judicature 400, 407 (1981). The elementary principles of separation of powers and federalism inherent in American government prescribe a limited role for the federal judiciary.

CONCLUSION

For the foregoing reasons, the amici urge this Court to grant the Petitions for Certiorari to the United States Court of Appeals for the Eighth Circuit of the State of Missouri, Jackson County, Missouri, and Icelean Clark, et al.

Respectfully submitted,

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FILED
APR 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1194

In the Supreme Court of the United States

OCTOBER TERM, 1988

ICELEAN CLARK, *et al.*,
Petitioners,
vs.
KALIMA JENKINS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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No. 88-1194

In the Supreme Court of the United States

OCTOBER TERM, 1988

ICELEAN CLARK, *et al.*,
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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

— Alexander Hamilton
The Federalist No. 78

Representative taxation and a federal judiciary limited to the adjudicative function lie at the heart of our

constitutional form of self-government. The levying of court-imposed property taxes, even as a "last resort," epitomizes "the pretence of a repugnancy" which so greatly concerned Mr. Hamilton.

Respondents treat lightly the awesome power harnessed by the lower courts in this litigation; they argue for a universal acceptance of one Circuit Court's concept of the the juridical function. However, we should not confuse idiosyncratic judicial legislation—the display of judicial WILL—with the proper exercise of Article III authority under the Constitution. "[N]o system of justice can exist without law and order, and . . . the integrity of the democratic process is more important in a self-governing republic than any specific result we could seek to reach by that process." Remarks of Sidney Hook, the Shavano Institute (May 1985), *reprinted in* S. Hook, *Between Democracy and Despotism*, Imprimis (February 1986).

No less than the integrity of our democratic process —at least the integrity of the federal judiciary's role in that process—is at stake in this case. *Does a federal trial judge have the power to order a property tax levy increase to generate revenues deemed necessary to fund a judicial remedy*? One could hardly imagine an issue of more gravity or fundamental relevance to this Court's responsibility in declaring "the sense of the law" and protecting "the integrity of the democratic process."

I.

THIS COURT HAS JURISDICTION TO REVIEW THE QUESTIONS PRESENTED BY THIS PETITION.

Petitioners concur with the State of Missouri's comprehensive response to the jurisdictional challenge submitted by Respondents and join in those arguments. *See* State Reply Br. at 2-6 (in *State of Missouri v. Jenkins*, No. 88-1150). Two points must be stressed: First, the Eighth Circuit's January 10, 1989 *nunc pro tunc* order did not confer, or attempt to confer, the jurisdiction of this Court; this order simply clarified the circumstances surrounding the rehearing process in this appeal. Second, the Eighth Circuit alone is empowered to construe Rule 35, Fed.R.App.P., and determine whether a rehearing paper[1] filed with the court "is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc." Rule 35, Fed.R.App.P., Advisory Committee Notes. *See Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 250 (1953) (the appellate court under 28 U.S.C. Section 46(c) "is left free to devise its own machinery to provide the means whereby a majority may order" rehearing *en banc*).

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1. All three petitions for rehearing filed by the three groups of petitioners in these related actions, Nos. 88-1150, -1194 and -1228, were identically captioned and similarly structured. Because all three rehearing petitions were filed within ninety days following the entry of judgment, all three petitions are timely for purposes of this Court's jurisdiction under 28 U.S.C. Section 2101(c).

II.

RESPONDENTS PROVIDE NO DEFENSE OF THE LOWER COURTS' ERRONEOUS AND DANGEROUS INTERVENTION PRECEDENT.

Respondent KCMSD's best defense of the lower courts' denial of Petitioners' intervention is a rehash of the courts' "untimeliness" conclusions and a suggestion that such a denial constituted "harmless error at worst." KCMSD Br. in Opp. at 24-26. Respondent Jenkins offered no defense of the unfair, unlawful and dangerous precedent established below in excluding from direct participation in this case the only litigants who are actually paying the judicially-imposed property taxes in question. The denial of intervention contravened basic principles of due process and intervention law. *See NAACP v. New York*, 413 U.S. 345, 365-66 (1973). This decision also is fundamentally unfair. *See* Clark Pet. at 10-11.

Petitioners' participation in this litigation as *amici curiae* cannot cure these due process deficiencies. While the State of Missouri has maintained its philosophical opposition to court-ordered property taxation, State Pet. at 22-28, the State fails to promote the remedy advanced by Petitioners, Clark Pet. at 23-24, and accepted by the dissent below, *i.e.*, reversal of the court-ordered property tax and application of joint and several liability principles[2] to generate the revenue necessary to fund the ulti-

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2. Curiously, the Eighth Circuit majority accepted the State's joint and several liability as the appropriate revenue source to fund the anticipated shortfall in KCMSD desegregation revenue resulting from the income tax surcharge reversal. (Clark Pet. Appendix, A45.) The majority opinion even suggested the State's joint and several liability as a resource in the event

(Continued on following page)

mate desegregation judgment. (Clark Pet. Appendix, A51-A52.) Obviously, the State's interests squarely conflict with those of district property taxpayers when the issue of alternative desegregation funding arises.

These taxpayers, represented by Petitioners, have a right to their day in court to protect *their* property and advance *their* arguments regarding the fair and constitutional manner in which to fund desegregation of the Kansas City public schools.[3]

Footnote continued—

future School Board-initiated property tax increases prove insufficient to meet desegregation costs. (*Id.*, A41 n.18.) Why this remedy was not adopted as the appropriate, less drastic judicial alternative for *all* desegregation funding liabiiity was not explained. *See* Note, *Judicial Taxation in Desegregation Cases*, 89 Colum. L. Rev. 332, 343-45 (1989). Respondents have ignored the joint and several liability issue altogether, even though they acknowledge that a judicial taxation power is contingent upon the court's having "exhausted all other possibilities for obtaining [desegregation] funds. . . ." KCMSD Br. in Opp. at (i). *See* Jenkins Br. in Opp. at 61 ("no other alternative to assure actual implementation of the remedy").

3. While the lower courts' intervention decisions constitute bad policy and troubling precedent, Petitioners acknowledge that briefing and argument of this issue may not be necessary. As Petitioners have submitted in their Conclusion, *infra*, in the event the Court agrees to hear at least the judicial taxation question presented by the State of Missouri's petition in No. 88-1150, the Court could grant this Petition, summarily reverse the denial of intervention and permit these Petitioners—through consolidation, intervention or litigating *amici curiae* status—to represent their interests in the briefing and argument of the judicial taxation question.

III.

THE LOWER COURTS' JUDICIAL TAXATION DECISIONS CONTRAVENE FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL SELF-GOVERNANCE AND SIGNIFICANTLY DEPART FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS.

Respondent KCMSD would have the Court believe that "[n]o one in this case . . . ever contended that a federal court has taxing power." KCMSD Br. in Opp. at 22. KCMSD, relying on *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), describes the lower courts' action as merely an exercise of "the power to require a State or municipality to exercise *its* taxing power where the Constitution commands that exercise, or to set aside State law that precludes its necessary constitutional exercise." KCMSD Br. in Opp. at 22 (emphasis in original) (footnote omitted).

This disingenuous argument seeks to draw a distinction without a difference and clouds the judicial action actually taken below. If it looks like a judicial tax, and acts like a judicial tax, it's not simply an injunction. Even Respondent Jenkins properly framed the issue as being whether a federal district court has "the power" to effectuate a complete constitutional remedy "by directing that tax levies be increased in order to provide the revenue necessary to afford" constitutional relief. Jenkins Br. in Opp. at ii. Moreover, the Eighth Circuit majority, in revamping the court-ordered property "tax increases," confessed the need to "modify its future operation to more closely comport with limitations upon our judicial authority. . . ." (Clark Pet. App., A6.) Respon-

dents' defense of this breathtaking expansion of judicial authority misstates apposite constitutional law, particularly *Griffin*, and, further, contravenes fundamental tenets of representative government.

A. *The District Court imposed its own $1.95 property tax levy increase to fund the court's judicial remedy.* Respondents fail to address the constitutionality of the $1.95 school district property tax levy directly imposed by Judge Russell Clark in his September 15, 1987 order. (App., A82.) This judicial levy, which has resulted thus far in the collection of over $50 million in new taxes,[4] occurred through judicial fiat and not as a result of an injunction authorizing local officials to exercise *their* taxing discretion. Judge Clark raised the levy from $2.05 to $4.00 per $100 assessed valuation. Local taxing authorities, including school officials, did nothing. Certainly, the voters had no say.

B. *The Eighth Circuit's modification of the property taxation scheme is a fiction that continues to contravene constitutional principles.* The Court of Appeals' majority panel revision, permitting the Kansas City School Board *carte blanche* in setting future—even annual—levy increases, only exacerbates the unrepresentative nature of the tax. To say that the federal trial court "will be removed from the process of setting the levy" (App., A42) is simply not true. The District Court still will be empowered to set the maximum levy (*id.*), which, as the State correctly notes, State Reply Br. at 9 n.11,

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4. Approximately $18 million of the court-ordered property taxes have been paid under protest by thousands of local taxpayers pursuant to state law. *See* Mo. Rev. Stat. Section 139.031. These protested sums are situated in interest-generating escrow accounts overseen by the property tax collector, Jackson County. Taxpayers will seek a refund of these taxes in the event the court-ordered levy is invalidated.

will be the District Court's idea of the minimum levy necessary, regardless of future School Board action. In addition, how can the School Board be deemed independent of the District Court when the Board's every act, including the setting of the tax levy, is supervised by the court-appointed Desegregation Monitoring Committee and, ultimately, the District Court itself?[5]

C. *A federal court's power to impose property tax increases, for any purpose, was not "long ago settled."* Without question, the proper interpretation of the constitutional principle established by this Court in *Griffin, supra,* is the key issue for review. Yet, throughout Respondents' elaborate discussion of judicial taxation "precedent,"[6] no one distinguished the enlightening analysis set forth in *Moses Lake Homes, Inc. v. Grant County,* 365 U.S. 744

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5. The modified ruling makes a bad (and unconstitutional) situation worse. Instead of a $1.95 levy increase in effect for five years, as the District Court had ordered, the Eighth Circuit modification permits the School Board to obtain from the trial court, without voter approval, a "reasonable" levy increase each year *ad infinitum.* School district officials are not shy about seeking such court-ordered increases, either. School officials were unable to obtain approval of an additional $.23 increase to go out in last fall's tax bills only because the Eighth Circuit's mandate had been stayed and the trial court was without jurisdiction to act. The KCMSD has recently announced a $25 million "collaborative plan" for increased teacher salaries. Because this expenditure is not included in projected desegregation and operation budgets, the cry has gone out for more court-ordered tax increases. Without this Court's intercession, Kansas City taxpayers will be looking directly into a "black hole" of politically unaccountable and unchecked judicial tax assessments.

6. Respondents' reliance on nineteenth century Contract Clause decisions to justify the court-imposed taxes here is misplaced. In those mandamus cases, the federal courts ordered municipalities to levy taxes to satisfy bond default judgments. A significant factor in these decisions was the conclusion that "when the legislature of a state authorizes a county or city to contract a debt by bond, it intends to authorize [the local government] to levy such taxes as are necessary to pay the debt. . . ." *United States ex rel. Ranger v. New Orleans,* 98 U.S. 381, 394 (1879). No such intention is presumed or established by the judicial taxation scheme at issue.

(1961), a decision rendered just three years before *Griffin*.[7] Petitioners cited this authority for its holding that "Federal courts may not assess or levy taxes. Only the appropriate [local] taxing officials . . . may assess or levy taxes . . . and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one." 365 U.S. at 752.

The *Moses Lake Homes* precedent, and its self-imposed limitations on a judicial tax levying function under Article III, were recently reaffirmed by this Court in *Davis v. Michigan Dep't of Treasury*, No. 87-1020 (U.S. March 28, 1989), where the Court concluded that state income tax legislation favoring retired state and local government employees over retired federal employees violated principles of intergovernmental tax immunity. *Id.*, slip op. at 13. In its remand instructions, the Court stated that the appellant's claim could be resolved either by extending the tax exemption to retired federal employees or by eliminating the exemption for retired state and local government employees. However, the *Davis* Court noted "[t]he latter approach, of course, could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court." *Id.* at 13-14 (*citing Moses Lake Homes, supra*, 365 U.S. at 752).

Indeed, as the original constitutional analysis provided by Petitioners points out, *see* Clark Pet. at 13-23, and as the *Davis* decision reconfirms, neither our Constitution nor 200 years of Supreme Court precedent authorize a federal court to directly impose a local property tax in-

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7. Seven of the nine Justices who joined in the *Griffin* opinion had joined in the *Moses Lake Homes* opinion in 1961. The expansive *Griffin* construction advanced by Respondents and decreed by the lower courts is flatly contradicted by the restraint-oriented philosophy permeating the *Moses Lake Homes* analysis.

crease. This Court now has the opportunity to more clearly establish the limitations on the federal judiciary's power to order tax increases for any purpose. If left unchecked, the Eighth Circuit's decisions, and the analyses employed therein, will serve as a springboard for further instances of court-ordered taxation to generate revenue streams for the funding of constitutional remedies.

CONCLUSION

This Court should grant this Petition for Writ of Certiorari and order argument on the questions presented. Alternatively, in the event this Court issues its writ of certiorari in *State of Missouri, et al. v. Jenkins, et al.*, No. 88-1150, Petitioners pray this Court (*i*) grant the Petition herein, (*ii*) summarily reverse the intervention decision reached by the Eighth Circuit below, and (*iii*) consolidate this action (No. 88-1194) with the State of Missouri's action (No. 88-1150) for briefing and argument of the second question presented by these Petitioners and the State of Missouri, *viz.*, whether a federal court has the power under the Constitution to "lay and collect Taxes."

Respectfully submitted,

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April 6, 1989